93-577

Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT J. MAXWELL,

Petitioner,

v.

THE FIRST NATIONAL BANK
OF MARYLAND, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the state secrets privilege prevent a private individual, who never entered into any secrecy agreement with the federal government, from offering his own testimony about conversations to which he was a party and documents disclosed to him during his employment, in support of his tort and civil rights claims against his former private employer, where the government concedes that it cannot, consistent with the First Amendment, prohibit that individual from revealing the same information publicly or punish him for doing so?

PARTIES

In addition to the listed parties, respondents Associated Traders Corporation and its Trustees, Thomas G. Hardic, John Keating, and Jeremy Tyrone, were defendants-appellees below. John Does 1-10, unknown officials of the Central Intelligence Agency, the Federal Bureau of Investigation, and the Department of Justice, were also named as defendants. In addition, respondent United States intervened below as a defendant-appellee in the court of appeals.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the appendix at App. 1a-4a. The court of appeals' judgment order is reported at 998 F.2d 1048 (table). The unreported protective order issued by the United States District Court for the District of Maryland is reproduced at App. 14a-15a, and its unreported opinion and order dismissing this case is reproduced at App. 5a-13a. The Magistrate Judge's report and recommendation, which is reported at 143 F.R.D. 50, is reproduced at App. 16a-33a.

JURISDICTION

The court of appeals' decision affirming the district court's dismissal of this case was issued on July 14, 1993.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides, in pertinent part:

> Congress shall make no law... abridging...the right of the people...to petition the Government for a redress of grievances.

42 U.S.C. § 1985 (2) provides, in pertinent part:

> If two or more persons in any State or Territory conspire, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully...the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

INTRODUCTION

This case involves an unprecedented invocation of the state secrets privilege to prevent a private bank executive, who had no consensual secrecy relationship with the federal government, from testifying in court about the bank's tortious conduct and about unlawful attempts by the bank and persons purporting to represent the federal government to prevent him from seeking legal redress for those wrongful acts. The lower courts extended the state secrets privilege to new lengths that prevented petitioner from introducing evidence that he had obtained as a bank employee before the case even began. Moreover, petitioner never had any indication that the information was classified, nor was he otherwise restricted by the government from disseminating it. In the absence of such consensual restrictions, the government concedes that it cannot constitutionally prevent petitioner from disclosing what would be the substance of his testimony to the public, as he has already done, nor can the government

punish petitioner for doing so or sue him for his past disclosures.

The decisions below effectively make it impossible for private citizens ever to prove that they were the subject of threats against themselves and their families by agents of federal intelligence agencies motivated by a desire to conceal improper and perhaps illegal covert actions. This is true even though the citizen's claim may go forward without *any* discovery or official confirmation from the government, based solely on his own recollection of the threats that were made against him, and of documents shown to him that explain the motivation for these threats. The courts below have allowed the government to misuse the state secrets privilege to deprive a private citizen of his right under the Constitution to seek redress in a court of law for the threats made against him.

This case differs sharply from prior state secrets cases in which the privilege has been invoked to prevent the use of the judicial process to elicit evidence from the government or from those obligated by agreement with the government to maintain secrecy. In extending the state secrets privilege to bar the introduction of evidence lawfully obtained by petitioner outside the discovery process without any promises to the government of secrecy, the lower courts contravened the First Amendment and this Court's decisions in *Butterworth v. Smith*, 494 U.S. 624 (1990), and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). This Court should review this case because it raises important constitutional issues resolved by the lower courts in a manner inconsistent with this Court's First Amendment decisions and with prior state secrets cases of this Court and the lower courts.

STATEMENT OF THE CASE

Because this case was dismissed based solely on petitioner's first amended complaint, which is reproduced in the Appendix at 34a-56a, and the invocation of the state

secrets privilege, the facts alleged in the complaint must be taken as true. Moreover, since petitioner had previously survived a motion to dismiss challenging the legal sufficiency of his claims, the complaint must be presumed to state valid common law tort claims under Maryland law and a valid claim under 42 U.S.C. § 1985. District Court Memorandum and Order (June 11, 1990); District Court Memorandum and Order (Oct. 22, 1990).

A. Factual Background

From October 1983 to August 1985, petitioner, Robert J. Maxwell, worked as an international banking executive at the respondent First National Bank of Maryland ("FNB"), a private, commercial bank. In that capacity, he was responsible for managing the Letters of Credit Department of FNB's International Division. First Amended Complaint ¶ 9.

During his employment, Mr. Maxwell's supervisor directed him to handle letters of credit for respondent Associated Traders Corporation ("ATC"). The supervisor told Mr. Maxwell that ATC was, in fact, a proprietary corporation of the Central Intelligence Agency ("CIA"), and other bank officials reiterated that assertion throughout Mr. Maxwell's employment. *Id.* ¶¶ 11, 39, 40, 41, 45, 47, 48, 49.

Mr. Maxwell never applied for a security clearance to handle the ATC account, nor was he ever told that he needed one. Affidavit of Robert J. Maxwell ¶ 4 (Jan. 24, 1991). He also never entered into any agreement with FNB, ATC, or the CIA to keep secret what he learned about ATC or its accounts. *Id.* ¶ 6. None of the documents relating to these two accounts was marked classified, and Mr. Maxwell never received any other indication while he was a bank employee that they were classified. *Id.* ¶ 7.

Mr. Maxwell believes, and alleged in his complaint, that during his bank employment, ATC purchased weapons and electronic equipment worth millions of dollars to send to

Central America, Angola, and Afghanistan in violation of federal law. First Amended Complaint ¶ 12. As the bank employee carrying out ATC's financial transactions, Mr. Maxwell was an unwitting and unwilling participant in those transactions.

Specifically, in December 1983, Mr. Maxwell was directed by one of his superiors to pay $2.2 million on a letter of credit issued on behalf of ATC for the purchase of 60,000 Enfield rifles from India. *Id.* ¶ 13. Contrary to normal banking procedures, he was instructed not to have a clerk assist him in the transaction and not to make a copy of the bill of lading and the commercial invoice for the transaction. *Id.* ¶¶ 13-14.

In December 1984, Mr. Maxwell was instructed to transfer more than $5.3 million from ATC's account to a Panamanian bank and then to a bank in Switzerland. This transaction normally would have been handled by another bank officer and would have gone directly to FNB's correspondent bank in either Switzerland or New York, rather than be routed through a Panamanian bank. *Id.* ¶ 20. In addition, contrary to normal banking procedures, Mr. Maxwell was directed not to include the name of the client on any of the transfer documents, and not to discuss the ATC account with other bank employees with whom he was ordinarily free to consult. *Id.* ¶¶ 21-22.

A third questionable transaction occurred in February 1985. Mr. Maxwell was directed to, and did, transfer approximately $47,600 from ATC's account through a Panamanian account to a Swiss bank account, with instructions that the transfer documentation not identify ATC. *Id.* ¶ 28. After completing this transfer, a representative of ATC told Mr. Maxwell that:

> Associated Traders had used the Panamanian bank too often and that he wanted Mr. Maxwell to find another bank in Panama through which to transfer Associated Traders'

> funds. The Associated Traders' representative also instructed Mr. Maxwell to close the two Associated Traders' accounts at the Bank and to find a "hidden" account in the Bank from which to conduct Associated Traders' business, so that the company's transactions could not be detected by bank or federal auditors. The Associated Traders' representative also stated specifically that he feared discovery of the company's Cayman Island money market accounts.

Id. ¶ 30. ATC officials also instructed Mr. Maxwell not to convey information about the account to ATC over the telephone. *Id.* ¶ 31.

Based on all of these circumstances, Mr. Maxwell believed that ATC was engaging in illegal arms transactions by transferring arms without prior, written authorization from the United States government. *Id.* ¶¶ 10, 15, 24. As a non-lawyer, Mr. Maxwell believed that such written authorization was generally required, but he did not know the particular source or details of any specific authorization requirements. In fact, his belief was well founded since the Arms Export Control Act, 22 U.S.C. § 2778(b), requires government registrations and export licenses for private arms exports, and other federal statutes require the Executive Branch to notify Congress of governmental arms exports and prohibit certain arms deals altogether. Intelligence Oversight Act, 50 U.S.C. §§ 413, 415 (requiring congressional notification of covert operations); Boland Amendments, Department of Defense Appropriations Act of 1985, § 8066, Pub. L. No. 473, 98 Stat. 1935, and Intelligence Authorization Act for Fiscal Year 1985, § 801, Pub. L. No. 618, 98 Stat. 3304 (barring certain military assistance to the Nicaraguan Contras). Based on the unusual manner in which the bank and ATC handled the transactions, Mr. Maxwell also concluded that ATC was trying to conceal its transactions and that the bank was participating in the illegal scheme. First Amended Complaint

¶ 23.

In February 1985, Mr. Maxwell discovered that his name appeared on the ATC account in place of ATC's, which made him the sole responsible party to receive banking statements and verification documents for the ATC account. *Id.* ¶ 26, 42. This caused Mr. Maxwell great consternation because he believed that he might be held criminally and civilly liable for any illegal activity conducted by ATC. *Id.* ¶¶ 26, 48, 68.

Once Mr. Maxwell concluded that he was being required to conduct illegal activities, he sought written authorization from FNB for the transactions that he had conducted, and he demanded that his name be removed from the ATC account. *Id.* ¶¶ 27, 32, 34, 36, 43, 44, 45, 47, 56, 60. The bank initially ignored his requests, and thus his name remained on the account for some time. *Id.* ¶ 42. Moreover, despite his protestations that he wanted no involvement in any illegal activities, the bank continued to direct Mr. Maxwell to carry out ATC transactions. *Id.* ¶¶ 27-32. When he continued to object, his bank supervisors threatened his job security, his personal safety, and his family's safety, and they led Mr. Maxwell to believe that the CIA was behind the threats. *Id.* ¶¶ 33-45, 53. Mr. Maxwell also received unsubstantiated negative comments in his performance evaluations, even though he had previously received exemplary performance reviews, successive salary increases, and a promotion to senior international banking executive. *Id.* ¶¶ 16, 17, 19, 38, 51-54. The harassment by his superiors and threats of retaliation caused Mr. Maxwell to fear for his personal safety and that of his family, and, along with the other harassment, made his working conditions so intolerable that he was forced to resign. *Id.* ¶ 58.

After he left FNB, Mr. Maxwell continued to seek written authorization for the work that he had performed for ATC. *Id.* ¶¶ 60, 61. Mr. Maxwell never received that

authorization, but instead faced further harassment and threats invoking the name of the CIA. *Id.* ¶ 61. As a result of these events, Mr. Maxwell suffered a nervous breakdown and has since been unable to obtain a job in the banking industry, which has caused him and his family great financial hardship. *Id.* ¶¶ 62-63.

When Mr. Maxwell filed this action in August 1988, he attached to his complaint his copies of bank records that documented the ATC transactions, identified him as the person responsible for the ATC account, and contained his unsatisfied requests for written authorization for his work in carrying out the ATC transactions. Mr. Maxwell filed as exhibits to subsequent pleadings in this case other bank records in his possession concerning the ATC transactions carried out by the bank, including letters of credit, transfers of funds, monthly bank statements, ATC's corporate banking and borrowing resolutions, and ATC's business cards and checking account signature cards. None of these documents was filed under seal, nor has anyone moved to seal the court record in this case in the more than five years that it has been pending. In addition, Mr. Maxwell has spoken publicly about what had happened to him, and the news media have disseminated his allegations about the illegal ATC arms deals, the abusive conduct of FNB and others toward him, and this lawsuit.

After he filed this case, agents of FNB and several purported government agents threatened Mr. Maxwell in a further attempt to prevent him from pursuing this case. In particular, Joseph Finnerty, counsel for the bank, told the attorney who was then representing Mr. Maxwell that several government officials had told Mr. Finnerty to warn the attorney "to go easy" in the lawsuit or else he would be disbarred and Mr. Maxwell would be criminally prosecuted. *Id.* ¶¶ 65-66. These threats caused Mr. Maxwell further severe emotional distress, for which he also seeks compensation in this lawsuit.

B. Proceedings Below

In this case, Mr. Maxwell seeks redress under Maryland law for the intentional infliction of emotional distress and his abusive discharge caused by the bank's retaliation for his refusal to carry out illegal bank transactions. Mr. Maxwell also challenges FNB's misappropriation of his name by using it on the ATC account without his consent and refusing to remove it. Finally, Mr. Maxwell seeks redress under 42 U.S.C. § 1985(2) against the bank for the threats made in furtherance of a conspiracy between the bank and government agents to prevent him from pursuing this case. The district court had jurisdiction over the § 1985 claim pursuant to 28 U.S.C. §§ 1331 and 1343, and had pendent jurisdiction over the state law claims.

In discovery, Mr. Maxwell took the depositions of his immediate FNB supervisors, who answered numerous questions pertaining to Mr. Maxwell's work on the ATC accounts, but refused to answer other questions about the nature of the ATC transactions, the extent to which they deviated from normal banking procedures, and the status of the CIA as a bank customer. Deposition of Ronald Teather (Jan. 17, 1989); Deposition of Robert Dael (Feb. 9, 1989). Mr. Maxwell filed a motion to compel, and in July 1990, the district court directed the deponents to respond to the unanswered deposition questions. Order (July 19, 1990).[1] When FNB refused to comply with the discovery order, Mr. Maxwell filed a motion to enforce it. Motion (Nov. 1990).

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[1]The bank's only stated objection in the depositions was based on the confidentiality of its bank clients' business information under Maryland Financial Institutions Code, Article I-301(c), which the district court found inapplicable. Mem. at 3 (July 19, 1990). However, in response to the motion to compel, the bank also sought to invoke the state secrets privilege, which the court properly concluded could not be invoked by a private party. *Id.* at 2.

The United States then filed a motion, based on the state secrets privilege, seeking a protective order precluding "all discovery and/or the disclosure of any information during any proceedings in this matter that tends to either confirm or deny any alleged connection between the CIA and either FNB or ATC." Motion for a Protective Order (Dec. 26, 1990). The motion contended that Mr. Maxwell cannot obtain an official confirmation or denial of whether the CIA had a relationship with ATC or FNB, and Mr. Maxwell now agrees that he cannot obtain such a confirmation. However, the government did not limit its motion to official confirmation of a CIA role, but also sought to preclude the disclosure of *any* information from *any* source, including petitioner's own testimony, that would "tend" to confirm or deny the existence of such a relationship.

In support of its claim, which extended not only to discovery but also to other evidence at trial, the United States submitted a declaration of William Webster, then Director of Central Intelligence, formally invoking the privilege. Nothing in the public Webster declaration explained why the state secrets privilege should bar petitioner's own testimony about information that was conveyed to him in the ordinary conduct of private commercial activities, or why routine bank documents reflecting these activities would fall within the privilege. The United States also proffered an *ex parte*, *in camera* declaration in support of its privilege claim, but there is no indication in any of the opinions below that the secret declaration provides any rationale for extending the protective order to information acquired by petitioner prior to, and outside of, the discovery process.

Mr. Maxwell opposed the government's motion because it sought to prevent a private individual, who never had any consensual secrecy relationship with the CIA or with any covert operation, from disclosing information that he obtained in carrying out commercial banking transactions. Moreover, Mr. Maxwell pointed out that the broad order sought by the government would run afoul of the First

Amendment and this Court's decisions in *Butterworth v. Smith* and *Seattle Times Co. v. Rhinehart* because it would prevent him from offering his own testimony and other evidence already in his possession, none of which was obtained in discovery. Finally, Mr. Maxwell particularly objected to the invocation of the state secrets privilege to prevent him from seeking redress for the emotional harm caused by the illegal threats made to deter him from prosecuting this case.

The district judge referred the pending motions to Magistrate Judge Catherine C. Blake, who issued a report and recommendation on October 9, 1991, recommending that the protective order sought by the United States be granted both as to the information sought in discovery and as to the information already in Mr. Maxwell's possession. App. 16a-33a. In her report, the Magistrate Judge recognized that prior state secrets cases had involved requests for information either from the government or from a current or former government employee or contractor who had entered into a secrecy agreement that barred disclosure of information obtained through their relationship with the government. App. 21a-22a. Tacitly acknowledging that the public and *in camera* submissions established that FNB itself had such a relationship with the government, she found the privilege applicable to FNB, but she never explained how the privilege could be extended to Mr. Maxwell, who unquestionably had no such relationship. App. 22a-23a.

Magistrate Blake next observed that the disclosure of information concerning CIA activities to private individuals does not destroy the privilege as to any further information about those activities. App. 23a-26a. Based on this unexceptional proposition, however, the Magistrate Judge precluded not only an official confirmation from the government of its role in ATC's activities, which Mr. Maxwell no longer seeks, but also the testimony of a private individual regarding what he was told about those activities while conducting private business. With respect to the

threats made to deter Mr. Maxwell from prosecuting this case, the Magistrate Judge never explained how national security would be compromised by Mr. Maxwell's or his former attorney's testimony about these illegal activities.[2]

Finally, the Magistrate Judge skirted the argument that the First Amendment stands in the way of an order barring petitioner from introducing documentary evidence in his possession, or from testifying about what he did, saw, or was told by his superiors. In a footnote, she dismissed the First Amendment rulings in *Butterworth* and *Seattle Times* on the grounds that national security was not at issue there. App. 23a n.7. In her only other reference to Mr. Maxwell's First Amendment argument, she justified barring his own testimony on the theory that cases can be dismissed entirely to prevent the disclosure of state secrets, without identifying an independent basis for preventing his testimony. App. 28a.

Mr. Maxwell filed timely objections to the Magistrate Judge's report and recommendation. By order dated April 29, 1992, the district court affirmed and adopted the Magistrate's report and recommendation, without any analysis or discussion, and issued a protective order, which first precluded Mr. Maxwell "from seeking or obtaining any discovery that relates to his allegations of covert relationships between the CIA and either defendant First National Bank or defendant Associated Traders Corp." App. 14a-15a. This part of the district court's order is not at issue in this petition.

In an unprecedented expansion of the state secrets

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[2]The Magistrate also did not address Mr. Maxwell's assertion that the state secrets privilege cannot conceal the illegal threats made to prevent Mr. Maxwell from pursuing this case. Instead, she focused on whether the privilege applies to the underlying arms transactions, even though Mr. Maxwell does not need to prove that those transactions were illegal in order to prevail on any of his claims.

privilege, however, the district court also barred Mr. Maxwell "from offering in support of the amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA and defendants FNB and ATC." App. 14a-15a. This portion of the protective order, which is what petitioner is challenging, bars him from offering his own testimony about his mistreatment by his private employer and bars him from introducing documents obtained by him outside the discovery process during his bank employment.

By memorandum and order entered September 30, 1992, the district court granted judgment in favor of defendants because it concluded that further proceedings would likely run afoul of the constraints imposed in its broad protective order. App. 5a-13a. In so ruling, the district court did not decide whether petitioner would be unable to make out a *prima facie* case under a more narrowly drawn protective order that permitted him to testify and introduce documentary evidence in his possession.

The Court of Appeals for the Fourth Circuit reviewed the *in camera* submissions and concluded that the district court properly issued the protective order and granted judgment to respondents. App. 3a-4a. The court's very short opinion did not address any of Mr. Maxwell's arguments against extending the state secrets privilege to bar his own testimony, but simply relied on the Magistrate Judge's report without any discussion. App. 1a-4a.

REASONS FOR GRANTING THE WRIT

The principal issue in this case is the extent to which the state secrets privilege may reach information communicated to private individuals, who have no consensual secrecy relationship with the government. Typically, the government invokes the privilege to prevent the discovery of information in its possession. Where the requirements of the privilege are met, it bars such discovery. *See United States v. Reynolds*, 345 U.S. 1 (1953); *In re United States*, 872

F.2d 472 (D.C. Cir.), *cert. dismissed sub nom. United States v. Albertson*, 493 U.S. 960 (1989); *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978).

The government has also successfully asserted the privilege to prevent its current or former employees or agents from disclosing information that they were obligated to keep secret as a result of their relationship with the government. *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1843 (1993) (government contractor); *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991) (same); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (same); *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236 (4th Cir. 1985) (government employees); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) (government contractors); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (*en banc*) (government contractor & employee); *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968) (government agent); *Sigler v. LeVan*, 485 F. Supp. 185 (D. Md. 1980) (government employee).

In no prior case, however, has a court applied the privilege to bar a private litigant from using information that he obtained outside the discovery process and without a consensual secrecy arrangement with the government. To the contrary, in *Halpern v. United States*, 258 F.2d 36, 44 (1958), the Second Circuit refused to uphold a state secrets claim with respect to information in the plaintiff's possession that he did not obtain as a result of any governmental employment or similar relationship. There, an inventor, who had been precluded from obtaining a patent because the government concluded that public disclosure of the invention would harm national security, sought compensation pursuant to a federal statute. The government argued that the case had to be dismissed under the state secrets privilege, but the

Second Circuit disagreed principally because Mr. Halpern was "not seeking to obtain secret information which he does not possess." *Id.* at 43-44.

Similarly, last Term, in urging this Court not to grant a writ of certiorari in a state secrets case, the government emphasized that the sealed information at issue had been obtained through discovery. Brief for the United States in Opposition to Petition for a Writ of Certiorari *in Rautenberg v. United States District Court for the Central District of California*, No. 92-1347, *cert. denied*, 113 S. Ct. 2333 (1993). This Court declined to review the lower court's refusal to unseal a protective order where the plaintiff, who previously had a consensual secrecy relationship with the federal government, had obtained access to the protective order, as well as to the underlying secret information, through civil discovery and the courts' processes. Indeed, the government's question presented highlighted the fact that the protective order was "entered by the district court to limit dissemination of information obtained through civil discovery and protected by the state secrets privilege." U.S. Brief at I.

In contrast to *Rautenberg*, and in conflict with *Halpern*, the protective order issued in this case goes far beyond information obtained through the discovery process and prohibits the use of evidence obtained prior to the institution of any legal proceedings and already disclosed in court submissions without objection from the bank or the government. This is in direct contrast with prior state secrets cases that have applied the privilege to information obtained by a litigant outside the discovery process only where the party obtained the information through a consensual secrecy relationship with the federal government. *See* cases cited *supra* at 13-14.

This limitation follows from the logic of an early state secrets case -- *United States v. Totten*, 92 U.S. 105 (1876) -- in which the privilege was described as an implied

covenant of an individual's secret employment or contractual relationship with the government. In *Totten*, the estate of an individual hired by the President to spy behind confederate lines during the Civil War brought an action to recover compensation under his employment contract. This Court refused to allow the lawsuit to proceed because it concluded that secrecy was an implied condition of his secret employment arrangement. *Id.* at 106.

Similarly, in *Snepp v. United States*, 444 U.S. 507 (1980) (*per curiam*), this Court enforced a secrecy agreement signed by a CIA agent as a condition of his employment and imposed a constructive trust on the proceeds obtained from his publication of a book without first submitting it for prepublication review as required under his secrecy agreement. In doing so, the Court emphasized that Snepp had voluntarily relinquished his First Amendment rights by signing the secrecy agreement and accepting employment as a CIA agent. *Id.* at 509 n.3.; *cf. Smith v. MCI Telecommunications Corp.*, No. 87-2110, 1993 U.S. DIST. LEXIS 6114 (D. Kan. Apr. 28, 1993) (First Amendment bars imposition of protective order preserving confidentiality of settlement terms in the absence of a confidentiality provision in the settlement agreement).

There is no precedent for extending such secrecy obligations to private individuals, like Mr. Maxwell, who had no consensual, secrecy relationship with the government. Mr. Maxwell never sought or obtained government employment, a government contract, or even a governmental security clearance. Nor did he enter into any agreement with the government or the bank to refrain from disclosing the information that underlies this case. Instead, as a private citizen employed as an international banking executive, he was made an unwitting participant in suspicious and potentially illegal transactions. Indeed, it is precisely that involuntary participation in what he concluded were illegal activities that first gave rise to his concerns and inquiries, and then to the bank's abusive conduct and retaliatory

actions, including the threats designed to stop him from pursuing this litigation, all of which led to the emotional harm and financial losses for which he seeks redress.

Nonetheless, the government contends that it may invoke the state secrets privilege to preclude a private individual from using information learned in his purely private employment, with no restrictions attached, when he seeks redress for harms caused in that employment. This argument, however, is in conflict with the very nature of an evidentiary privilege. Under principles common to other privileges, such as the attorney-client and marital privileges, when information that may otherwise be privileged is disclosed to another person who has no obligation to maintain its confidentiality, the privilege is lost, and that person may testify about it. 8 J. Wigmore, *Evidence in Trials at Common Law*, § 2285, at 527-28; § 2311 at 599-603; § 2340, at 671-72 (J. McNaughton Rev. Ed. 1961, 1991 Supp.).

A contrary rule would lead to bizarre results. For example, if, as the lower courts held, the privilege continues to apply notwithstanding the lack of secrecy maintained over the particular information, it would allow the government to bar the testimony of a nongovernmental expert who deduces government involvement in a covert activity from purely public sources. Indeed, if the state secrets privilege has the broad reach ascribed to it by the lower courts, then the target of a government threat (of the sort received by Mr. Maxwell) could be barred from testifying as to that threat, and even an eyewitness to a covert CIA murder could be precluded from testifying as to what he saw.

Furthermore, the lower courts' application of the state secrets privilege is inconsistent with the First Amendment. In an analogous context, this Court held that the First Amendment prevents a state from barring a grand jury witness from divulging information that he had obtained prior to testifying before the grand jury. *Butterworth v. Smith*,

494 U.S. 624 (1990). In *Butterworth*, a reporter, who had publicized improprieties in the offices of the state attorney and the sheriff, was called before a grand jury investigating those matters. A state statute prohibited him from divulging the contents of his grand jury testimony, including the information that was in his possession before he testified. This Court unanimously held that the statute, which is functionally equivalent to the application of the state secrets privilege at issue here, violated the First Amendment to the extent that it barred a private party from disseminating information that he had obtained independently of his participation in the grand jury proceedings. *Id.* at 1381, 1383.

Lower courts have broadly applied the same principle to hold that persons may not be barred from disseminating information that they have obtained outside of judicial or administrative proceedings. *See, e.g., First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467, 479 (3d Cir. 1986)(*en banc*)(witnesses before board investigating judicial misconduct cannot be barred from disclosing their own testimony); *Kamasinski v. Judicial Review Council*, 797 F. Supp. 1083, 1094-96 (D. Conn. 1992) (complainant cannot be barred from disseminating basis for complaint about judicial misconduct); *Doe v. Florida Judicial Qualifications Commission*, 748 F. Supp. 1520, 1523 (S.D. Fla. 1990) (same).

Similarly, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34, 37 (1984), this Court upheld a protective order against a First Amendment challenge because the order was limited to information obtained through the discovery process and did not prevent a party's dissemination of information obtained from other sources. In reaching this conclusion, the Court stressed:

> [I]t is significant to note that an order prohibiting dissemination of discovered information before trial . . . prevents a party

> from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes.

Id. at 33-34 (citation omitted).

Neither the court of appeals nor the district court addressed the conflict between these First Amendment precedents and the order barring Mr. Maxwell's use of information obtained not only outside the discovery process, but before the case began. The Magistrate Judge attempted to deal with the First Amendment issues by pointing out that *Butterworth* did not involve national security, but never explained the relevance of that distinction since grand jury secrecy also protects extremely sensitive information and is zealously protected by the courts. App. 23a n.7.

Moreover, as other courts have recognized, even CIA agents retain *some* First Amendment rights in their writings concerning their CIA employment -- a context that clearly involves national security. Thus, in *United States v. Marchetti*, 466 F.2d 1309, 1313, *cert. denied*, 409 U.S. 1063 (1972), the Fourth Circuit stated that "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship." It went on to hold that a former CIA agent retains First Amendment rights to speak publicly about the CIA, limited only by the requirement that "he may not disclose classified information obtained by him during his employment which is not already in the public domain." *Id.* at 1317.

Similarly, in *McGehee v. Casey*, 718 F.2d 1137, 1147-49 (1983), the D.C. Circuit held that prepublication reviews may not suppress unclassified information or information obtained from public sources. *See also Alfred A.*

Knopf, Inc. v. Colby, 509 F.2d 1362, 1367 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) (prepublication reviews can suppress only properly classified information); *National Federation of Federal Employees v. United States*, 695 F. Supp. 1196 (D.D.C. 1988) (government cannot impose unconstitutionally vague obligations through secrecy agreements). If CIA agents retain First Amendment rights, certainly a private individual, like Mr. Maxwell, who never relinquished any of his rights, cannot be stripped of his First Amendment right to petition the courts for redress of his grievances.

Under the First Amendment, courts may prohibit the dissemination of only that information obtained through discovery or through a consensual relationship with the government that carries with it express or implied secrecy obligations. The "denial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked.... Only when no amount of effort and care on the part of the court and the parties will safeguard the privileged material is dismissal warranted." *Fitzgerald*, 776 F.2d at 1242, 1244. The protective order issued in this case goes far beyond what is necessary to safeguard privileged material and also infringes Mr. Maxwell's First Amendment right of access to the court.

The protective order's inconsistency with the First Amendment is highlighted by the fact that the government concedes that it cannot prevent Mr. Maxwell from disclosing information acquired during his bank employment or punish him for having done so. In fact, Mr. Maxwell has publicly told his story to reporters, who have covered it widely in the press. He has also recited the same facts in his public court filings and has submitted numerous FNB documents as exhibits, without objection from the bank or the government. Recognizing the limitations imposed by the First Amendment, the government has not tried to preclude Mr. Maxwell from talking to reporters, prosecute him for having

done so, *cf. United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988), or sue him for damages. *See Snepp*, *supra*. Nor has it sought to seal any papers filed in this case. Nonetheless, the government argues that state secrets will be compromised if, at trial, Mr. Maxwell repeats the *same* allegations in his testimony or offers the *same* documents that are already exhibits in the public file in this very case.

Presumably any national security harm occurred long ago from Mr. Maxwell's unobjected-to court filings and press disclosures, and will not be compounded by Mr. Maxwell's reiteration of his past disclosures at trial. Indeed, what precipitated the government's motion for a protective order was not Mr. Maxwell's disclosures of what happened to him in his bank employment, but his attempts to obtain confirmation in discovery of a CIA role in those activities.

The government persists in its state secrets claim even though Mr. Maxwell no longer seeks government confirmation of any CIA role. Indeed, as a matter of law, whether the CIA was, in fact, involved is irrelevant to Mr. Maxwell's claims and the possible defenses in this case. Significantly, at no stage of the proceedings below has the bank explained how a CIA relationship to ATC affords the bank (as opposed to the CIA or ATC) a valid defense to any of Mr. Maxwell's claims. If the CIA directed the bank to take retaliatory actions against Mr. Maxwell, those directions might support a bank indemnification claim against the CIA, but would not be a defense to liability for injuries caused to an innocent third party, like Mr. Maxwell, even if the state secrets privilege prevented the bank from impleading the CIA to seek indemnification. Regardless of whether the CIA was, in fact, involved, the bank cannot threaten the personal safety of its employees and their families, place its employees' names on accounts as the responsible party against their wishes, make them carry out transactions that lack proper documentation, and otherwise make their working conditions so intolerable that they are compelled to resign and suffer

severe emotional distress. Nor can the bank (or anyone else for that matter) conspire and make threats to keep individuals from pursuing their First Amendment right to seek redress of grievances in the courts. Nor, by way of analogy, could the bank avoid liability for engaging in racial discrimination in its employment practices because the CIA may have asked or even told it to do so. Just as in the hypothetical race discrimination case, Mr. Maxwell does not need to establish a CIA role to prove his claims, nor can the bank avoid liability by invoking whatever role the CIA might have had.

Because this case presents important constitutional issues resolved by the courts below in a manner at odds with this Court's First Amendment precedents and the state secrets jurisprudence of this Court and the lower courts, the petition should be granted.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1993

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ROBERT J. MAXWELL,
Plaintiff-Appellant,

v.

FIRST NATIONAL BANK OF MARYLAND; ASSOCIATED TRADERS CORPORATION, a/k/a Central Intelligence Agency; JOHN DOES 1-10, unknown officials of the Central Intelligence Agency, The Federal Bureau of Investigation and the Department of Justice,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Intervenor,

and

THOMAS G. HARDIC; JOHN KEATING; JEREMY TYRONE, Trustees for Associated Traders Corporation, a/k/a The Central Intelligence Agency,
Defendants.

No. 92-2393

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-88-2702-WN)

Argued: May 4, 1993

Decided: July 14, 1993

Before MURNAGHAN and WILLIAMS, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Patti Ann Goldman, PUBLIC CITIZEN LITIGATION GROUP, Washington, D.C., for Appellant. Freddi Lipstein, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. Francis Xavier Wright, PIPER & MARBURY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Alan B. Morrison, Paul R.Q. Wolfson, PUBLIC CITIZEN LITIGATION GROUP, Washington, D.C.; Lynne Bernabei, Lawrence S. Ottinger, BERNABEI & KATZ, Washington, D.C., for Appellant. Stuart M. Gerson, Assistant Attorney General, Richard S. Bennett, United States Attorney, Leonard Schaitman, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. Joseph G. Finnerty, Jr., Brigit A. McCann, PIPER & MARBURY, Baltimore, Maryland, for Appellee First National Bank; William John Hickey, MONTEDONICO, HAMILTON & ALTMAN, P.C., Washington, D.C., for Appellee Associated Traders Corp.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Robert J. Maxwell appeals the order of the district court limiting the scope of discovery in his case against First National Bank of Maryland (FNB), his former employer, and Associated Trader's Corporation (ATC). Maxwell also appeals the court's grant of summary judgment in favor of FNB and ATC.

Maxwell sued FNB and ATC for conspiracy to interfere with his civil rights, violations of his First Amendment right of free speech,

and violations of his Fifth Amendment right to seek redress of grievances in the courts of the United States. He also sued FNB for abusive discharge, intentional infliction of emotional distress, and misappropriation of name. Central to Maxwell's case is his claim that ATC was a proprietary company of the Central Intelligence Agency.

During the course of discovery, the United States filed a suggestion of interest and a motion for a protective order based upon the state secrets privilege. The proposed order would "preclud[e] all discovery or the disclosure of any information during any proceedings in this matter that would tend to either confirm or deny any alleged connection between the" CIA and either the bank or ATC. The Director of Central Intelligence, William H. Webster, submitted a Declaration and Formal Claim of State Secrets Privilege, as well as an *ex parte, in camera* declaration that justified invocation of the privilege.

The court referred the matter to a magistrate judge who recommended granting the government's motion for a protective order. She also recommended that

> Mr. Maxwell be precluded from seeking or obtaining any discovery that relates to his allegations of covert relationships between the Central Intelligence Agency ("CIA") and either defendant First National Bank of Maryland ("FNB") or defendant Associated Traders Corp. ("ATC"); and
>
> ... Mr. Maxwell be precluded from offering in support of the amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA and defendants FNB and ATC.

Maxwell timely objected to the magistrate's report and recommendation. The district court reviewed the matter *de novo* and adopted the magistrate's report and recommendations. The court subsequently granted summary judgment for FNB and ATC.

Our review of the record and the documents submitted for *in camera* inspection discloses that the district court properly granted the

government's motion for the protective order and FNB's and ATC's motions for summary judgment. Accordingly, we affirm for reasons adequately stated in the magistrate's report and in the opinion of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT J. MAXWELL :

v. : Civil Action No. WN-88-2702

THE FIRST NATIONAL BANK
OF MARYLAND, *et al.* :

MEMORANDUM

Pending before the Court are Defendants' First National Bank (FNB) and Associated Traders Corp. (ATC) Supplemental Motions to Dismiss, or in the alternative, for Summary Judgment (Paper Nos. 93 & 107), filed on October 31, 1991, and June 15, 1992, respectively. Plaintiffs have filed Oppositions (Paper Nos. 102 & 112) and FNB has Replied (Paper No. 106).[1] Because the motions concern plaintiff's ability to prove his claim, rather than challenging the legal sufficiency of his allegations, the Court reviews them as Motions for Summary Judgement. Fed. R. Civ. P. 56. Upon a review of the motions, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendants' motions should be granted.

I. *BACKGROUND*

Plaintiff Robert Maxwell filed this action against FNB and ATC, alleging the following: (1) conspiracy in violation of 42 U.S.C. § 1985(2); (2) violation of the First and Fifth Amendments of the United States Constitution; (3) abusive discharge; (4) intentional infliction of emotional distress; and

---

[1] Also pending before the Court is Plaintiff's unopposed Motion to Create a Public Record (Paper No. 103), filed May 19, 1992. This motion is moot in light of the Court's disposition of the Defendants' Motions for Summary Judgment.

(5) misappropriation of name. First Amended Complaint at 2. His claims stem from alleged relationships among FNB, ATC, and the Central Intelligence Agency (CIA), through which illegal arms transactions allegedly took place. *See id.* The facts surrounding Maxwell's claims are set out more fully in this Court's Order and Memorandum dated October 22, 1990, denying earlier motions by Defendants to dismiss Plaintiff's claims. Paper Nos. 55 & 56. In that Order, the Court dismissed Maxwell's claim under the First Amendment as to Defendant ATC, as well as the Fifth Amendment claims against both ATC and FNB, but sustained Plaintiff's remaining claims. Paper No. 56.

The case was referred to Magistrate Judge Blake (Paper No. 89) for recommendations as to dispositive pretrial matters, including a Motion for a Protective Order filed December 26, 1990, by the United States. In that motion, the government invoked the state secrets privilege with regard to information concerning alleged CIA involvement with either FNB or ATC. Paper No. 62. The Court affirmed and adopted the report and recommendation of Magistrate Judge Blake, and issued a protective order based on that report. Paper No. 101. The protective order provides in part:

> b. Mr. Maxwell is precluded from seeking or obtaining any discovery that relates to his allegations of covert relationships between the Central Intelligence Agency ("CIA") and either defendant [FNB] or defendant [ATC];
>
> c. Mr. Maxwell is precluded from offering in support of this amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA and defendants FNB and ATC . . . .

Id.

In light of this Order, FNB and ATC move for summary judgment on the grounds that Maxwell cannot substantiate any of his claims without evidence made

unavailable by the protective order. Paper Nos. 93 & 107. The Court agrees. Accordingly, both Motions for Summary Judgment will be granted.

II. *SUMMARY JUDGMENT STANDARD*

Summary judgment is proper if the evidence before the court, consisting of the pleadings, depositions, answers to interrogatories, and admissions of record, establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Rule 56 mandates the entry of summary judgment against a party who, after reasonable time for discovery and upon motion, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial [and] [t]he moving party is 'entitled to judgment as a matter of law.'" *Id.* at 323. (citations omitted).

If the evidence favoring the non-moving party is "merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). Unsupported speculation is insufficient to defeat a motion for summary judgment. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986)). Moreover, the mere existence of some factual dispute is insufficient to defeat a motion for summary judgment; there must be a genuine issue of material fact. *Anderson*, 477 U.S. at 247-48. Thus, only disputes over those facts that might affect the outcome of the case under the governing law are considered to be "material." *Id.*

Finally, in assessing such a motion, the Court must view the evidence and all justifiable inferences in the light

most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

With these principles in mind, the Court will address the arguments presented by the parties.

III. *ANALYSIS*

Under the terms of the protective order, Maxwell is prevented from discovering or presenting at trial any evidence relating to the alleged relationships among FNB, ATC, and the CIA. Paper No. 101. The Court must, therefore, determine whether Maxwell can offer sufficient evidence of his claims without violating the order.

The focus of the court's inquiry in a situation involving state secrets is not whether the plaintiff can establish a *prima facie* case without the protected information, but rather, whether the state secrets are so central to the case that the litigation would create the risk of disclosure of the secrets. *Fitzgerald v. Penthouse Internat'l, Ltd.*, 776 F.2d 1236, 1238-39 n.3 (4th Cir. 1985). Dismissal is appropriate when "[it is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue" the case. *Farnsworth Cannon v. Grimes*, 655 F.2d 268, 281 (4th Cir. 1980). In light of this standard, each count in the amended complaint is evaluated below.

A. Conspiracy in violation of 42 U.S.C. § 1985(2)

Section 1985 prohibits conspiracies to interfere with an individual's civil rights. Subsection 2 specifically prohibits obstructing justice and intimidating participants in matters before a federal court. A person who is injured by such a conspiracy has an action for money damages. 42 U.S.C. § 1985.

Maxwell alleges that agents of the Federal Bureau of Investigation (FBI), CIA, and the Department of Justice

(DOJ) made threats against him and his attorney after Maxwell commenced legal action against FNB and ATC, and that those threats were communicated through counsel for FNB. Opposition to First National Bank's Supplemental Motion ("FNB Opp.") at 7. Thus, Maxwell alleges a conspiracy between government agents and FNB in violation of 42 U.S.C. § 1985(2). *Id.* Maxwell contends that the threats by FBI and DOJ agents, as communicated by FNB, are sufficient to sustain his claim without any reference to the CIA. *Id.* at 8. He therefore argues that his claim remains viable despite the protective order. *Id.*

The Court finds that Maxwell cannot sustain Count I as to Defendant FNB consistent with the protective order. The conspiracy alleged by Maxwell concerns the CIA acting in conjunction with FBI and DOJ agents. *Id.* at 7. Thus, it is conceivable that evidence that tends to confirm or deny the existence of the CIA's role in the alleged relationship would surface at trial. Such evidence is prohibited by the protective order. As a result, FNB's motion will be granted as to Count I.

For the same reason, Maxwell's claim against ATC also must fail. Maxwell contends that the relationship between FNB and ATC establishes a connection sufficient to tie ATC to the threats allegedly made by FBI and DOJ agents, independent of any relationship between ATC and the CIA. Opposition to Defendant Trustees Associated Traders Corporation's Motion ("ATC Opp.") at 10-14. Because ATC participated in allegedly illegal activities with FNB, according to Maxwell, it is reasonable to conclude that ATC had knowledge of and participated in the conspiracy to keep Maxwell from pursuing legal recourse. *Id.* at 14.

For this claim to be viable, Maxwell first must establish the connection between FNB and the government agents. *Id.* As discussed above, however, the protective order prohibits Maxwell from substantiating the involvement of government agents in his claim against FNB. As a result,

his evidence also is insufficient to implicate ATC in the conspiracy. Accordingly, ATC's motion will be granted as to Count I.

B. Violation of the First and Fifth Amendments

The only portion of Count II remaining after this Court's Order of October 22, 1990, is the claim of a First Amendment violation by FNB acting as an agent of the federal government. Paper No. 56. This count was based on the same allegations as the 42 U.S.C. § 1985(2) claim, namely, that FNB's counsel communicated threats made by FBI, DOJ, and CIA agents to Maxwell and his attorney. FNB Opp. at 8-9. Because evidence of this alleged conspiracy is inadmissible in light of the protective order, Maxwell will be unable at trial to substantiate his claim that FNB acted in concert with the federal government. Without a showing of state action, his First Amendment claim must fail. *Stevens v. Morrison-Knudsen Saudi Arabia Consortium*, 576 F. Supp. 516, 521-22 (D. Md. 1983), *aff'd*, 755 F.2d 375 (4th Cir. 1984). Consequently, this claim will be dismissed as to Defendant FNB.

c. *Wrongful Discharge*

Maxwell argues that his discharge for refusing to conduct illegal transactions violates public policy. FNB Opp. at 10. He claims that no reference to the CIA is necessary to prove his claim because FNB's actions would have violated public policy even without the CIA's involvement. *Id.* at 16. Therefore, he does not have to refer to the CIA to substantiate his claim. *Id.*

The transactions at issue, however, would not have been illegal if conducted on behalf of the CIA, as alleged in the complaint. *See* 22 U.S.C. § 2278 (no authorization is required for arms transactions made by or for agencies of the United States government). Thus, evidence regarding the legality or illegality of the conduct would tend either to confirm or deny the existence of a relationship between FNB and the CIA in violation of the protective order.

Maxwell contends that FNB entered voluntarily into its alleged relationship with the CIA and that FNB should not be allowed to deny that relationship now. FNB Opp. at 10. Maxwell misunderstands the nature of the state secrets privilege -- it is claimed by the government, not by FNB. *United States v. Reynolds*, 345 U.S. 1, 7 (1953). Thus, Maxwell's argument is not persuasive.

Maxwell also maintains that FNB should not be allowed to get away with allegedly harassing him and giving him a low performance evaluation simply because he started asking questions about the ATC transactions. FNB Opp. at 16-17. While Maxwell's position evokes some empathy, the fact remains that evidence to substantiate Maxwell's allegations on this count runs the risk of confirming or denying CIA involvement with FNB. Consequently, the protective order precludes introduction of evidence relating to his claim, and Count III will be dismissed.

D. Intentional Infliction of Emotional Distress

Maxwell's emotional distress claim focuses on FNB's allegedly outrageous conduct in asking him to conduct illegal transactions and harassing and threatening him when he refused. FNB Opp. at 18. He also bases this count on his lowered performance evaluation and relatively small pay increase. *Id.* at 17. These allegations, like the others in his complaint, raise the possibility that a party would introduce evidence tending to confirm or deny the existence of relationships among the CIA, FNB, and ATC. As discussed above, the very illegality of the transactions at issue hinges on whether the government was involved in them. *See* 22 U.S.C. § 2778. If Maxwell introduced evidence that he was asked to engage in illegal activities, FNB's defense necessarily would involve showing that the transactions were not illegal. Evidence by either party on this issue would tend to confirm or deny CIA involvement in the transactions. Consequently, Maxwell's claim cannot proceed consistent with the protective order. Accordingly, Count IV will be

dismissed.

V. *Misappropriation of Name*

Plaintiff maintains that his name was placed on ATC's accounts so that FNB could retain ATC's business. FNB Opp. at 19. Thus, he claims, FNB misappropriated his name for commercial purposes. *Id.* Any inquiry into the reasons why Maxwell's name was used in this context potentially tends to confirm or deny the existence of a relationship with the CIA. Therefore, the claim requires disclosure of evidence prohibited by the protective order. This count also must be dismissed in light of that order.

VI. *CONCLUSION*

Maxwell's claims cannot be sustained without violating the protective order. The conspiracy he alleges in violation of 42 U. S.C. § 1985(2), as well as his First Amendment claim, implicate the CIA and cannot effectively be proved or rebutted without introduction of evidence prohibited by the protective order. Maxwell's remaining claims hinge on the illegality of the underlying transactions involving ATC. Evidence within the scope of the protective order would be necessary to establish the legality or illegality of the transactions. Accordingly, both FNB's and ATC's Motions for Summary Judgment will be granted.

A separate Order will issue.

/s/

William M. Nickerson
United States District Judge

Dated: September 30, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT J. MAXWELL :

v. : Civil Action No. WN-88-2702

THE FIRST NATIONAL BANK
OF MARYLAND, *et al.* :

ORDER

In accordance with the foregoing Memorandum, and for the reasons stated therein, IT IS, this 30th day of September, 1992, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant FNB's Motion for Summary Judgment (Paper No. 107), filed on June 15, 1992, BE, and the same hereby IS, GRANTED:

2. That Defendant ATC's Motion for Summary Judgment filed October 31, 1991 (Paper No. 93), BE, and the same hereby IS, GRANTED; and

3. That Judgment BE and hereby IS GRANTED in favor of defendants and against the plaintiff; and

4. That plaintiff Maxwell's Motion to Create a Public Record (Paper No. 103), filed May 19, 1992, IS DENIED as moot; and

5. That the Clerk is directed to docket this case as CLOSED on this court's docket; and

6. That the Clerk is directed to mail copies of this Order and the foregoing Memorandum to counsel in this case.

/s/
William M. Nickerson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT J. MAXWELL :

v. : Civil Action No. WN-88-2702

THE FIRST NATIONAL BANK
OF MARYLAND, *et al.* :

ORDER

Pending before this Court are plaintiff's Objections to Magistrate's Report and Recommendation dated October 9, 1991 (Paper No. 92), filed October 29, 1991. The United States has responded (Paper No. 94), and the plaintiff has replied (Paper No. 98). Upon consideration of Judge Blake's Report and Recommendation and the objections thereto, and after a *de novo* review of the entire matter, the Court determines that Judge Blake's Report and Recommendation should be affirmed and adopted.

Accordingly, IT IS this 29th day of April, 1992, by the United States District Court for the District of Maryland, ORDERED:

1. That the Report and Recommendation of United States Magistrate Judge Catherine C. Blake entered October 9, 1991 (Paper No. 91), is AFFIRMED and ADOPTED;

a. That the United States' motion for a protective order is GRANTED;

b. Mr. Maxwell is precluded from seeking or obtaining any discovery that relates to his allegations of covert relationships between the CIA and either defendant First National Bank or defendant Associated Traders Corp.;

c. Mr. Maxwell is precluded from offering in support of the amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA

and defendants FNB and ATC;

d. plaintiff's motion to enforce the Court's order of July 19, 1990 and motion for sanctions is DENIED;

e. the United States' motion to stay discovery is DENIED as moot;

f. Public Citizen and National Security Archive's motion for leave to file a brief as *amici curiae* is GRANTED;

g. plaintiff's motion for leave to file in excess of thirty interrogatories is DENIED;

h. plaintiff's motion to defer ruling on United States' motion for protective order until completion of relevant discovery is DENIED;

i. defendants', trustees of ATC, motion for protective order is DENIED as moot;

j. the United States' motion to quash subpoena and stay further discovery is DENIED as moot;

k. defendant FNB's motion for a protective order is DENIED as moot;

2. That plaintiff's objections to the Report and Recommendation filed October 29, 1991 (Paper No. 92) are OVERRULED;

3. That pursuant to the Court's Order dated November 18, 1991 (Paper No. 95), Plaintiff has twenty (20) days from the date of this Order to file his opposition to Defendant FNB's Supplemental Motion to Dismiss, or in the Alternative, for Summary Judgment;

4. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

/s/

William M. Nickerson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT J. MAXWELL :

v. : Civil Action No. WN-88-2702

THE FIRST NATIONAL BANK
OF MARYLAND, *et al.* :

REPORT AND RECOMMENDATION

In accordance with 28 U.S.C. § 636 and Local Rule 301, Judge William M. Nickerson has referred to me the discovery disputes in this case for resolution. On December 26, 1990, pursuant to 28 U.S.C. § 517, the United States of America filed a suggestion of interest in the present case and moved for a protective order, asserting the state secrets privilege. The proposed order has two parts. The first would preclude all discovery that relates to allegations of any relationships between the Central Intelligence Agency ("CIA") and defendant Associated Traders Corporation ("ATC") or defendant First National Bank of Maryland ("FNB"). The second part would bar the introduction at any proceeding in this matter of any information, regardless of its source, that relates to the alleged relationships. On January 29, 1991, the plaintiff, Robert J. Maxwell, filed an opposition, and on February 21, 1991, the United States filed a reply.[1] This matter is ready for decision.[2] For the

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[1] On January 29, 1991, Public Citizen and National Security Archive filed a motion for leave to file a brief as *amici curiae*. (Paper No. 66). I recommend that the motion be granted. In the brief, they argue that the United States' motion for a protective order should be denied. For the sake of clarity, all of the arguments seeking denial of the protective order will be referred to as plaintiff's.

reasons set forth below, I recommend that the United States' motion for a protective order be granted.

This dispute arises out of Mr. Maxwell's suit against FNB, ATC, Thomas G. Hardic, John Keating, and Jeremy Tyrone (the trustees for the now defunct ATC), and John Does, one through ten (ten unknown officials of the CIA, Federal Bureau of Investigation, and the Department of Justice). (Am. Compl. ¶ 1). From October 1983 to August 1985, Maxwell was employed by FNB as an international banking executive. During his employment, Maxwell handled letters of credit for ATC. (*Id.* ¶¶ 9, 14) Mr. Maxwell alleges that his superiors at FNB told him that ATC was a CIA corporation. (*Id.* ¶¶ 9, 54).

Mr. Maxwell suspected that ATC was engaged in arm deals in violation of federal law. (*Id.* ¶ 31). When Maxwell questioned these activities, he alleges that FNB and CIA officials threatened him. (*Id.* ¶¶ 66-67). Maxwell alleges that he asked that his name be removed from ATC account records and FNB failed to do so until one month later. (*Id.* ¶ 68). Maxwell states that his work conditions became so intolerable that he was compelled to resign from FNB, and this caused him to suffer a nervous breakdown. (*Id.* ¶¶ 58, 62).

On June 12, 1990, plaintiff filed an amended complaint which contained five counts: (1) violation of 42 U.S.C. § 1985(2); (2) a *Bivens* claim for violation of First and Fifth Amendment rights; (3) abusive discharge; (4) intentional infliction of emotional distress; and (5) misappropriation of name. Motions to dismiss were filed by FNB and ATC. (Paper Nos. 40-41). In an October 22, 1990 Order, Judge Nickerson granted ATC's motion to dismiss count two and granted FNB's motion to dismiss count two as

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[2] Various discovery motions are pending in this case. The resolution of the other motions depends on the outcome of the motion for protective order.

to the Fifth Amendment claim. (Paper Nos. 55-56).

On February 22, 1989, plaintiff filed a motion to compel discovery from FNB. (Paper No. 16). Specifically, plaintiff requested that Ronald Teather and Robert Dael, his supervisors at FNB, be compelled to answer questions in deposition regarding CIA's connection with FNB and the nature of various shipments by ATC. In addition, plaintiff asked the Court to order FNB to produce all wire fund transfers received by FNB on specified dates. On July 19, 1990, Judge Nickerson granted the motion to compel as to the deposition questions, and as to the documents to the extent that they have a reference to ATC. (Paper Nos. 43-44). The United States intervened with the present motion for a protective order in which it asserts the state secrets privilege. (Paper No. 62).

The seminal case on the state secrets privilege is *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the Supreme Court of the United States established a three part test to govern a claim of the privilege. "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8 (footnotes omitted); *Fitzgerald v. Penthouse Int'l. Ltd.*, 776 F.2d 1236, 1239-40 (4th Cir. 1985). The court must evaluate the claim of privilege without forcing disclosure of the very information that the privilege is designed to protect. *Reynolds*, 345 U.S. at 8; *Fitzgerald*, 776 F.2d at 1240. In evaluating an assertion of the privilege, a district court should sustain the privilege if it finds "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10; *Fitzgerald*, 776 F.2d at 1240; *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir.

1983), *cert. denied*, 465 U.S. 1038 (1984).[3]

The *Reynolds* Court noted that a party's need for the evidence may influence the extent of the court's investigation of the privilege assertion. *Reynolds*, 345 U.S. at 11; *Fitzgerald*, 776 F.2d at 1240. The Court stated, "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11; *Fitzgerald*, 776 F.2d at 1240; *Ellsberg*, 709 F.2d at 59.

In the present case, plaintiff has noted that the information sought is important to his case, and it would be very difficult for plaintiff to litigate his claims without it. (Pl. Opp. at 29). To establish his case, plaintiff must provide evidence that there was a relationship between the CIA and the defendants. (*Id.* at 28). He also must demonstrate that ATC transactions were illegal in order to prove a wrongful discharge claim. (*Id.* at 29). Because plaintiff has made a strong showing of need for evidence of a relationship between the CIA and the defendants, this Court has conducted an extensive investigation into the United States' assertion of the state secrets privilege.

The United States has followed the proper procedure under *Reynolds* in seeking to assert the state secrets privilege. The United States has made a formal claim of the privilege through the present motion, and it is supported by an affidavit by William H. Webster, the Director of Central Intelligence and head of the CIA. The CIA is the agency that has control over the matter because the requested discovery concerns the existence of a relationship between the CIA and

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[3] The privilege extends to diplomatic and intelligence - gathering matters as well as military secrets. *Ellsberg*, 709 F.2d at 57; *Halkin v. Helms (II)*, 690 F.2d 977, 990 (D.C. Cir. 1982).

ATC or FNB, and may involve CIA records over which Director Webster has control. (Webster Affid. ¶¶ 3, 5). Director Webster states in his affidavit that he has been made aware of the instant case and is familiar with plaintiff's allegations. (*Id.* ¶ 4). After personal consideration, Director Webster has determined that assertion of the privilege in this case is essential to protect the national security of the United States.

Director Webster states that any confirmation or denial of CIA activities would compromise national security. (*Id.* ¶ 9). The CIA uses "proprietary" businesses which either conduct or appear to conduct business as private companies. (*Id.* ¶ 7). The CIA frequently is asked to respond to requests for information about its contacts with companies alleged to be associated with the CIA. (*Id.*). Director Webster states that it is absolutely essential to prevent a confirmation or denial of such a relationship when to do so would damage national security. (*Id.* ¶ 8).

Director Webster explains that confirmation of relationships with the CIA could jeopardize sources and result in the loss of intelligence. (*Id.* ¶ 9). This could create a chilling effect on the CIA's ability to recruit new sources. Confirmation would also allow foreign intelligence entities to discover CIA methods of operation. (*Id.*); *See also Ellsberg*, 709 F.2d at 57 (harms against which the privilege is designed to protect include "disclosure of intelligence-gathering methods or capabilities").

A denial of a CIA relationship with a source may be equally damaging. A denial would allow foreign intelligence entities to concentrate efforts elsewhere. (Webster Affid. at ¶ 9). In addition, such a denial would inhibit the ability of the CIA to decline to confirm or deny future allegations because a refusal to respond would be tantamount to a confirmation. (*Id.*)

In addition to its motion and Director Webster's affidavit, the United States has provided a classified *ex parte*

declaration for *in camera* inspection by this Court. I have reviewed the motion, responses, and the classified material[4] and recommend that the United States' motion for a protective order be granted.

Plaintiff has made numerous arguments in opposition to the United States' motion. First, plaintiff claims that the government may not assert the privilege to bar discovery between private parties that have no connection with the government. Plaintiff contends that neither he nor FNB or any of its officials have ever had a relationship with the CIA. (Pl. Opp. at 23; *Amici* at 6, 9-10).

The cases involving the government's assertion of the state secrets privilege can be divided into two categories. The first category dealt with requests for information directed at a government agency itself. The courts found that the agencies could assert the privilege. *See Reynolds*, 345 U.S. 1 (upholding assertion of privilege by Secretary of the Air Force to avoid producing Air Force documents); *Northrop*, 751 F.2d 395 (quashing subpoena for documents to Department of Defense based on state secrets privilege in suit between two defense contractors); *Ellsberg*, 709 F.2d 51 (government successfully asserted privilege to avoid

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[4] An *in camera* review of documents by the court is not required as a matter of course in an evaluation of an assertion of the state secrets privilege. *Reynolds*, 345 U.S. at 10; *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401 (D.C. Cir. 1984). Because the information sought to be disclosed is central to the plaintiff's ability to maintain this lawsuit, however, I found it appropriate to review the initial classified affidavit dated December 12, 1990, and a supplementary affidavit dated July 10, 1991 submitted at my request addressing certain additional issues. The particular bank records in question were not reviewed beyond those attached to the plaintiff's answer to motion for summary judgment. (Paper No. 12).

disclosure by various agencies of surveillance information); *Halkin (II)*, 690 F.2d 977 (upholding CIA claim of privilege to bar discovery from the CIA in suit against CIA officials); *Halkin v. Helms (I)*, 598 F.2d 1 (D.C. Cir. 1978) (upholding National Security Agency claim of privilege to refuse to disclose Agency information).

The second category of cases involved the government asserting the state secrets privilege to prevent discovery from a current or former employee who had entered into a secrecy agreement that barred disclosure of information obtained through the relationship with the government. *See Fitzgerald*, 776 F.2d 1236 (Secretary of Navy successfully asserted the privilege to bar testimony of Navy scientist with knowledge of classified military information); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (valid assertion of privilege by Secretary of Navy in case against Navy employee).

Plaintiff claims that the United States may not assert the privilege in this case because discovery has been directed only to FNB and its officials, and there is no evidence that FNB or any of its officials have worked for the CIA or signed secrecy agreements with the CIA to keep information confidential. (Pl. Opp. at ¶ 23; *Amici* at 9-10).[5] Plaintiff's only support for this contention, however, is his belief, based on conversations with his superiors at FNB, that they did not have security clearances with the CIA. (Pl. Opp. at 4). Plaintiff argues that "unless the CIA can establish that such a relationship existed, there is no basis for the CIA to silence these individuals." (*Amici* at 10). The state secret that must be protected, however, is the existence of a relationship between the CIA and ATC or FNB. The CIA cannot be

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[5] At the request of the court, the CIA's supplementary *in camera* affidavit, specifically addressed the issue of secrecy agreements that may have been in effect as to any FNB or ATC officials.

forced to establish publicly that FNB officials have worked for the CIA and have entered into security agreements, as a predicate to asserting the state secret privilege to keep that very information from being disclosed. After reviewing the parties' submissions and the *in camera* materials, I am satisfied that the government's assertion of privilege is necessary in this case.

Plaintiff's next argument is that the United States may not assert the state secrets privilege because the information has been disclosed to persons without security clearances.[6] Plaintiff states that he is in possession of copies of various FNB documents concerning the ATC accounts. [7] (Pl. Opp. at 4-5). In addition, the possible existence of a relationship between the CIA and defendants has been the subject of published articles. (*Id.* at 16). Thus, plaintiff argues that because the information has been publicly disclosed, the government may not assert the state secrets privilege to bar

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[6] Plaintiff also claims that the information is not subject to the state secrets privilege because it is not classified. (Pl. Opp. at 18-19). However, the "privilege applies regardless of whether the information has actually been classified pursuant to the substantive and procedural requirements of applicable statutes or executive orders." *Halkin (II)*, 690 F.2d at 996 n.69.

[7] In support of the argument that he cannot be barred from introducing evidence in his possession, plaintiff cites *Butterworth v. Smith*, 110 S. Ct. 1376 (1990) (statute prohibiting witness from ever disclosing his own grand jury testimony violated the First Amendment as to disclosure after the grand jury's term expired). This case and others cited by plaintiff do not involve national secrets, and do not support plaintiff's position.

the use of information in this suit. (*Id.* at 25-26).[8]

The state secrets privilege belongs to the government. It can be neither claimed nor waived by a private party. *Reynolds*, 345 U.S. at 7. Plaintiff has failed to establish that the government has waived its privilege. The nature of a covert operation with a proprietary business is likely to result in contacts between the proprietary business and private sector businesses. In this case, plaintiff alleges that ATC was a CIA business which established accounts with FNB. A CIA business may need to engage a private bank to carry out its transactions. This necessarily would involve submitting information to the bank for account and transaction purposes. This information may be designed to appear as if the CIA business is a private business. Private sector employees without security clearances may handle this information in the course of employment with the Agency's intent that they not know the source of the documents.

Accidental disclosure cannot be viewed as an affirmative waiver by the government. If there is accidental disclosure to unauthorized persons, the government must retain its ability to minimize the damage by asserting its privilege to refuse to confirm or deny the existence of the secret information. In this case, plaintiff states that he has possession of copies of various ATC account documents. They may or may not contain information that is damaging to national security. If the government were forced to disclose more information regarding a possible CIA relationship to ATC or FNB, it could result in the publication of secrets that could jeopardize national security. The court in *Halkin (I)* discussed the problems involved in identifying whether information is sensitive:

It requires little reflection to understand that

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[8] It appears that any "public disclosure' is primarily a result of Mr. Maxwell's disclosure of information to the press.

the business of foreign intelligence gathering in the age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate. As the Fourth Circuit Court of Appeals has observed:

> The significance of one item of information may frequently depend upon knowledge of many items of information. What may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

Halkin (I)), 598 F.2d at 8-9 (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

This situation is analogous to a request for documents under the Freedom of Information Act ("FOIA"). Under FOIA an item must be "officially acknowledge" before disclosure can be required on the grounds that the information previously has been made public. *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar*

v. Department of State, 702 F.2d 1125 (D.C. Cir. 1983)). There are three requirements for an item to be considered "officially acknowledged": (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure. *Id.*

Plaintiff contends that the published articles speculating on a relationship between the CIA and ATC constitute public disclosure so as to bar the assertion of the state secrets privilege. Such a claim would fail to meet the FOIA public disclosure test. *See Alfred A. Knopf. Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir.) ("It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so"), *cert. denied*, 421 U.S. 908 (1975); *Marchetti*, 466 F.2d at 1318 ("Rumor and speculation are not the equivalent of prior disclosure"). An assertion of the state secrets privilege may well involve information more sensitive than that sought under a FOIA request. The state secrets privilege, therefore, must have a standard for waiver based on public disclosure that is at least as stringent as the one under FOIA. *See also Halkin II*, 690 F.2d at 994 (prior disclosure of some information about a project does not require disclosure of additional information about the same project).

Plaintiff next asserts that the information at issue may involve illegal activities and thus may not be protected by the state secrets privilege. (PI. Opp. at 6-8; *Amici* at 14). First, Mr. Maxwell's suggestion that the information involves

illegal activities is speculation.[9] Second, the cases that he cites do not support his premise. Plaintiff relies on *Goldberg v. U.S. Dep't of State*, 818 F.2d 71 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 904 (1988), which involved a discussion of Executive Order 12356. The Executive Order forbids classification of information that involves violations of law, but is not a threat to national security. *Id.* at 77. In the present case, plaintiff has failed to establish that the government is asserting the state secrets privilege solely to cover up illegalities. To the contrary, Director Webster's affidavit and the supporting *in camera* documents establish that the protective order is needed to protect national securities.[10] (Webster Affid. ¶ 8).

Plaintiff also challenges the sufficiency of Director Webster's affidavit. (Pl. Opp. at 34). Plaintiff claims that Director Webster has not personally read every document that is the subject of the proposed protective order. Thus, plaintiff argues that Director Webster has failed to give personal consideration to the matter as required by *Reynolds*. (*Id.* at 35-37).

Plaintiff takes an unrealistic view of the duties of the Director of Intelligence. In an organization the size of the CIA, the Director must rely to a degree on other agency

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[9] The classified material reviewed by this court *in camera*, including the supplementary affidavit, does not support the plaintiff's speculation.

[10] The cases governing FOIA requests are persuasive. *Cf. Founding Church of Scientology v. N.S.A.*, 610 F.2d 824, 829 n.49 (D.C. Cir. 1979)(under FOIA, NSA may refuse to produce documents that evidence illegal activity if disclosure would endanger national security); *Navasky v. C.I.A.*, 499 F.Supp. 269, 274 (S.D.N.Y. 1980) (finding "question of illegality irrelevant to the [FOIA] exemption claims").

officials. Although Director Webster may not have personally read every document, his affidavit is sufficient to convince this Court that he has assessed the necessity of asserting the privilege in consultation with other agency officials who are closely involved with the information involved in this case. *See Northrop*, 751 F.2d at 400 (finding sufficient personal consideration by Secretary of Defense when "he had reviewed a representative sample of the documents as well as affidavits of staff members who had received all of the documents"); *Molerio v. F.B.I.*, 749 F.2d 815, 821 (D.C. Cir. 1984) (Personal examination of individual documents not necessary when whole object of discovery and suit was to establish a state secret).

Invoking the First Amendment, Mr. Maxwell denies the existence of any precedent that would preclude him from offering in evidence bank documents already in his possession or his own testimony about alleged admissions by bank officials concerning the relationship of ATC, FNB, and the CIA. The Fourth Circuit's opinions in *Fitzgerald* and *Farnsworth*, however, support the issuance of a protective order such as that proposed by the government, in that those opinions authorize the even more drastic result of dismissing the plaintiff's case. Indeed, the assertion of the state secrets privilege in this case may, upon further motion, cause this court to evaluate whether the case may proceed at all.[11]

A successful assertion of the state secrets privilege may defeat "worthy claims for violations of rights that would otherwise be proved." *In re U.S.*, 872 F.2d 472, 476 (D.C. Cir. 1989). "If the information is essential to establishing plaintiff's prima facie case, dismissal is appropriate." *Id*; *see*

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[11] For that reason, Judge Nickerson has treated this referral as one involving a dispositive motion, subject to *de novo* review if objections are filed timely. *See* 28 U.S.C. § 636(b)(1) and the court's orders of June 4, 1991 and May 30, 1991.

also In re Under Seal ___ F.2d ___ ,No.90-2907 (4th Cir. Sept. 27, 1991) (summary judgment for defendant was proper when plaintiff was unable to demonstrate a dispute over material fact because assertion of privilege barred access to evidence regarding claim for intentional interference with business or occupation); *Farnsworth*, 635 F.2d at 281 (affirming dismissal of complaint because plaintiff's attempt to establish a *prima facie* case of tortious interference with reasonably expected future contract rights would threaten disclosure of state secrets);[12] *Halkin (II)*, 690 F.2d at 998-99 (upholding dismissal because plaintiffs could not establish standing without use of privileged information that would indicate whether plaintiffs' communications were intercepted by the government).

The *Fitzgerald* court found that the assertion of the state secrets privilege required a dismissal of that case. *Fitzgerald* involved a scientist who claimed he was libelled by an article which stated that he personally profited from the sale of classified military technology. *Fitzgerald*, 776 F.2d at 1237. In his suit against the defendant magazine, Fitzgerald intended to call expert witnesses to testify that his marketing brochures did not contain classified information. *Id.* at 1242. At least one of the witnesses, however, as well as Fitzgerald personally, had knowledge of classified military secrets that were relevant to the subject of the litigation. *Id.* The court found that the examination of these witnesses could result in probing dangerously close to the state secrets and could compromise national security even if a state secret was

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[12] Judge Phillips in *Farnsworth* proposed that a district court also be permitted to dismiss a complaint if a defendant "cannot fairly present a good faith, colorable affirmative defense, or fairly rebut the plaintiff's *prima facie* case, because of the privilege." 635 F.2d at 280. *See also In Re U.S.*, 872 F.2d at 476.

not directly disclosed. *Id.* at 1243. The court found that "the very subject of this litigation is itself a state secret." *Id.*

This analysis is persuasive in the present case. The state secret that must be protected is the existence of any relationship between the CIA and ATC or FNB. Plaintiff contends that even if the state secrets privilege is applicable, the case should be allowed to continue based on circumstantial evidence of a CIA role (*Amici* at 11). Plaintiff asserts that he does not have to prove that the CIA was associated with ATC or FNB. In order to prove his case against the bank, plaintiff claims that he merely has to establish that bank officials told him that the CIA controlled ATC. (*Id.*).

Plaintiff's scenario, however, is unworkable. In *Farnsworth*, the Fourth Circuit, sitting *en banc*, noted that plaintiff's counsel had not seen the *in camera* affidavit of the Secretary of the Navy. *Farnsworth*, 635 F.2d at 281. The assertion of the state secrets privilege had been upheld but counsel was unaware of the full scope of information determined to be state secrets. *Id.* The court, in upholding dismissal of the complaint, discussed the practical effect of letting the case continue:

> Information within the possession of the parties on the periphery of the suppression order would not readily be recognized by counsel, unaware of the specific contents of the affidavit, as being secret or as clearly having been suppressed by the general order of the district court. In an attempt to make out a prima facie case during actual trial, plaintiff and its lawyer would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing.

Id. In this case, once plaintiff alleges that FNB officials told him that the CIA was involved in ATC, the bank officials

and ATC would have to respond in order to defend themselves. Their response would go to the heart of the state secrets that must be protected.

Plaintiff also has filed a motion pursuant to Local Rule 104.1, requesting leave to file in excess of thirty interrogatories. (Paper No. 70). In his motion, Mr. Maxwell states that the interrogatories are to be served on the defendant trustees of ATC. Maxwell asserts that he needs more than thirty interrogatories in order to comprehensively inquire into the legality of various ATC transactions. Maxwell also contends that ATC's responses to the interrogatories are necessary for the court to determine whether the United States has properly asserted the state secrets privilege.

ATC's responses to the interrogatories would not assist the Court in assessing the assertion of the privilege in this case. As noted above, I have reviewed *in camera* the government's classified affidavit. Upon my request, an additional classified affidavit was submitted. These materials adequately addressed the information necessary to assess the government's claim of privilege.

Mr. Maxwell is not entitled to discover this information for the same reasons that the United States' protective order should be granted. The proposed interrogatories extensively inquire into seven ATC transactions. (Plf. motion; Exhibit 1). The interrogatories request specific information regarding the subject of shipments. They also call for the disclosure of government authorization for the transactions, including any communications between the CIA, the President and Congressional intelligence committees.

The responses to these interrogatories would relate directly to the existence of a relationship between the CIA and ATC or FNB. *In camera* review of classified information supports the finding that the United States' assertion of the state secrets privilege must be sustained to

prevent the disclosures called for by plaintiff's interrogatories.

Conclusion

After *in camera* review of the classified materials submitted by the government, and consideration of all the parties' submissions, I find the United States has shown a reasonable danger that disclosure of information concerning the existence of a relationship between the CIA and ATC or FNB would harm national interests, including intelligence-gathering methods and capabilities, and relations with foreign governments.

For the reasons set forth above, it is hereby recommended that:

(1) the United States' motion for a protective order (Paper No. 62) be **GRANTED**:

(2) Mr. Maxwell be precluded from seeking or obtaining any discovery that relates to his allegations of covert relationships between the Central Intelligence Agency ("CIA") and either defendant First National Bank of Maryland ("FNB") or defendant Associated Traders Corp. ("ATC"); and

(3) Mr. Maxwell be precluded from offering in support of the amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA and defendants FNB and ATC; and

(4) plaintiff's motion to enforce the Court's order of July 19, 1990, and motion for sanctions (Paper No. 57) be **DENIED**; and

(5) the United States' motion to stay discovery (Paper No. 58) be **DENIED** as moot; and

(6) Public Citizen and National Security Archive's motion for leave to file a brief as *amici curiae* (Paper No. 66) be **GRANTED**; and

(7) plaintiff's motion for leave to file in excess of thirty interrogatories (Paper No. 70) be **DENIED**; and

(8) plaintiff's motion to defer ruling on United States' motion for a protective order until completion of relevant discovery (Paper No. 71) be **DENIED**; and

(9) defendants', trustees of ATC, motion for protective order (Paper No. 72) be **DENIED** as moot; and

(10) the United States' motion to quash subpoena and stay further discovery (Paper No. 74) be **DENIED** as moot; and

(11) defendant FNB's motion for enlargement of time to respond further to first amended complaint (Paper No. 78) be **GRANTED**; and

(12) defendant FNB shall have until October 31, 1991 to file an additional response to the first amended complaint; and

(13) defendant FNB's motion for protective order (Paper No. 79) be **DENIED** as moot; and

(14) defendants', trustees of ATC, request for leave of court
for an extension of time in which to answer the amended complaint (Paper No. 80) be **GRANTED**; and

(15) defendants, trustees of ATC, shall have until October 31, 1991 to file an answer or otherwise respond to the amended complaint.

Oct. 9, 1991
Date

/s/
Catherine C. Blake
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT J. MAXWELL,

Plaintiff,

v.

THE FIRST NATIONAL BANK OF MARYLAND,

ASSOCIATED TRADERS CORPORATION, a/k/a THE CENTRAL INTELLIGENCE AGENCY

THOMAS G. HARDIC, JOHN KEATING, JEREMY TYRONE, TRUSTEES FOR ASSOCIATED TRADERS CORPORATION a/k/a THE CENTRAL INTELLIGENCE AGENCY

Civil Action No. HM 88-2702

SERVE: THOMAS G. HARDIC
Trustee of Associated Traders
2020 Butler Road
Butler, Maryland 21203

JOHN KEATING
Trustee of Associated Traders
Suite 1000
4720 Montgomery Lane
Bethesda, Maryland 20814

JEREMY TYRONE
Trustee of Associated Traders
1906 35th Place, N.W.
Washington, D.C. 20007

JOHN DOES ONE THROUGH TEN, UNKNOWN OFFICIALS OF THE CENTRAL

INTELLIGENCE AGENCY, THE FEDERAL BUREAU OF INVESTIGATION, AND THE DEPARTMENT OF JUSTICE,

Defendants.

FIRST AMENDED COMPLAINT FOR MONETARY AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL

Preliminary Statement

1. This is an action against the First National Bank of Maryland ("Bank") for injuries plaintiff Robert J. Maxwell suffered as a result of the defendant's wrongful constructive discharge in retaliation for plaintiff's refusal to carry out illegal banking transactions for Associated Traders Corporation, a proprietary company of the Central Intelligence Agency ("CIA"). In addition, this is an action against the Bank, the Associated Traders Corporation a/k/a the Central Intelligence Agency, and John Does One Through Ten, Unknown Officials of the CIA, the Federal Bureau of Investigation ("FBI"), and the Department of Justice, for violation of Mr. Maxwell's First Amendment and Fifth Amendment constitutional rights and for conspiracy to interfere with his civil rights protected under 42 U.S.C. § 1985(2).

Jurisdiction and Venue

2. This court has subject matter jurisdiction over plaintiff's claims pursuant to 28 U.S.C. §§ 1331, 1332, 1343, and 1361. This court has pendent jurisdiction over plaintiff's state common law claims.

3. Venue is appropriate under 28 U.S.C. §§ 1391 and 1402.

Parties

4. Plaintiff Robert J. Maxwell is a resident of the Commonwealth of Pennsylvania, who resides at 77 Crosswind Drive, Shrewsbury, Pennsylvania 17361.

5. Defendant First National Bank of Maryland is a nationally chartered bank with its principal place of business in Baltimore, Maryland.

6. Defendant Associated Traders Corporation was incorporated in 1969, and organized and operating under the laws of Maryland, with its principal place of business in Vienna, Virginia. Upon information and belief, Associated Traders Corporation was a proprietary company of the U.S. Central Intelligence Agency ("CIA"), organized and operated to assist the CIA to carrying out covert operations.

7. On or about August 10, 1988, the Associated Traders Corporation dissolved voluntarily. Pursuant to Md. Corporations Code Ann. § 3-410, Associated Traders' directors Thomas G. Hardic, John Keating, and Jeremy Tyrone became the trustees of Associated Traders' assets and are able to be sued in their own names and in the name of Associated Traders for claims against Associated Traders.

8. Defendants John Does One through Ten are unknown officials of the CIA, the FBI, and the Department of Justice, who conveyed threats to Mr. Maxwell and Mr. Maxwell's attorney.

Factual Allegations

9. In October, 1983, Mr. Maxwell began his employment with the defendant Bank as an International Banking Executive. Mr. Maxwell was responsible for managing the Letters of Credit Department of the International Division of the Bank. Mr. Maxwell also provided advice to importing and exporting companies.

10. Prior to his employment with the Bank, Mr. Maxwell served with other international banking executives on the Council on International Banking ("Council") in New York City. In meetings of the Council, Mr. Maxwell and

the other members of the Council discussed the documentation that banks required for transactions involving the sale of arms. Based upon these meetings, Mr. Maxwell understood that it was unlawful for the bank to process transactions for the purchase of arms without prior written, governmental authorization.

11. During the first week of Mr. Maxwell's employment with the Bank, Ronald Teather, Manager for International Operations, asked Mr. Maxwell to work on the Associated Traders Corporation ("Associated Traders") account. Mr. Maxwell agreed as long as the work was documented properly and was within Mr. Maxwell's area of responsibility. Mr. Teather told Mr. Maxwell that Associated Traders was in fact the CIA. The following day Mr. Teather gave Mr. Maxwell a form to complete for the CIA in order for Mr. Maxwell to obtain CIA approval to do work for the Associated Traders' account.

12. Associated Traders was a "dummy" corporation. The office address listed on the Associated Traders' letterhead had no telephone and no staff. Associated Traders' representatives gave Mr. Maxwell a telephone number for a CIA office in Vienna, Virginia, close to CIA headquarters. Upon information and belief, from 1981 to 1985, Associated Traders purchased arms, weapons, and electronic equipment worth at least $23 million to send to Central America, Angola, and Afghanistan.

13. In December, 1983, Mr. Teather directed Mr. Maxwell to pay $2.2 million on a Letter of Credit issued on behalf of Associated Traders, for the purchase of 60,000 Enfield rifles from India. Mr. Teather ordered Mr. Maxwell not to have a clerk assist in the transaction, even though a clerk normally would have processed this type of transaction.

14. After Mr. Maxwell paid on the Letter of Credit for Associated Traders for the purchase of the rifles, Mr. Teather told Mr. Maxwell not to copy the bill of lading and the commercial invoice for the transaction. These

instructions were contrary to usual and normal international business transactions, and increased Mr. Maxwell's suspicions that the transaction was not lawful. Despite Mr. Teather's instruction, Mr. Maxwell maintained a copy of these documents so that there would be a written record of this transaction if he were ever questioned about it.

15. Upon information and belief, the Congress of the United States was not informed of, and did not authorize, this purchase and transfer of weapons. Upon information and belief, the Secretary of State also did not approve or supervise this purchase and transfer of weapons.

16. In February, 1984, a number of bank officials complimented Mr. Maxwell for the improvement in the Letter of Credit Department since he became Manager of the Department.

17. In April, 1984, Mr. Teather gave Mr. Maxwell a six-months review of "excellent", and raised Mr. Maxwell's salary from $37,000 to $40,000.

18. In or about June, 1984, the Bank transferred Mr. Teather from the central office of the Bank in Baltimore to another office in York, Pennsylvania. Robert Dael succeeded Mr. Teather as Manager of International Operations and became Mr. Maxwell's new supervisor.

19. In October, 1984, after Mr. Maxwell had been employed by the Bank for one year, the Bank promoted Mr. Maxwell to Senior International Operations Executive, and increased his salary to $43,000.

20. In or around December, 1984, John Bond, Vice President for International Operations, instructed Mr. Maxwell to transfer more than $5.3 million, on behalf of Associated Traders. Five or six banks were to transfer this sum to the Associated Traders' account at the Bank, and the Bank was then to transfer the total amount to a Panamanian bank, and then to a bank in Switzerland. Mr. Bond directed Mr. Maxwell to make this transfer for Associated Traders even though it did not fall within the scope of Mr. Maxwell's

duties. A transfer of this sort would have normally been handled by the Paying and Receiving Office of the Bank.

21. Mr. Maxwell carried out the transfer described in paragraph 20 above, on January 3, 1985. This transfer was contrary to usual and normal banking practices, in part, because Associated Traders was transferring funds to Switzerland by means of a Panamanian bank. Further, Mr. Bond told Mr. Maxwell not to state the name of the client on any of the transfer documents, but to state only that the transfer was made "Attention Dr. Schaefer".

22. Mr. Bond told Mr. Maxwell not to discuss this matter with Mr. Dael because Mr. Dael did not have authorization to handle the Associated Traders account.

23. Mr. Maxwell concluded that Associated Traders was trying to conceal the transfer, and that the Bank was participating in the illegal scheme. Based upon Mr. Maxwell's prior experience with the Associated Traders' transaction in December, 1983, involving the purchase and transfer of arms, Mr. Maxwell believed that this second transfer also involved the purchase of arms or weapons.

24. Mr. Maxwell reasonably believed that written, formal United States governmental authorization was required for arms transactions. However, Mr. Bond instructed Mr. Maxwell to make the transfer for Associated Traders without this governmental authorization.

25. On February 15, 1985, Mr. Teather called Mr. Maxwell to tell him that Associated Traders would come into the Bank the following week to make another transfer.

26. Also in February, 1985, Mr. Maxwell discovered that Mr. Bond, without Mr. Maxwell's consent, had placed Mr. Maxwell's name on the Associated Traders' statements where Associated Traders' address should be placed. Mr. Maxwell was effectively the sole responsible party to receive the banking statements and verification documents for the Associated Traders' account. Mr. Maxwell reasonably believed that because his name was the only one on the

Associated Traders' account, that he could be held criminally and civilly liable for any illegal activity conducted by Associated Traders.

27. On February 19, 1985, Mr. Maxwell wrote a memorandum to Mr. Bond to request written authorization for his work on "out of the ordinary" transactions for the Associated Traders Corporation.

28. On February 22, 1985, Mr. Bond directed Mr. Maxwell to transfer approximately $47,600 from the Associated Traders' account at the Bank, first to a Panamanian account and then to a Swiss bank account. Mr. Bond told Mr. Maxwell that the transfer documentation was to state only that it was made "by order of a client" and to the attention of "Dr. Schaefer".

29. Mr. Maxwell agreed to make the transfer because he expected that the Bank would very soon be providing him with the written authorization he had requested.

30. Later on the day that Mr. Maxwell completed the transfer, a representative of Associated Traders met with Mr. Maxwell to tell him that Associated Traders had used the Panamanian bank too often and that he wanted Mr. Maxwell to find another bank in Panama through which to transfer Associated Traders' funds. The Associated Traders' representative also instructed Mr. Maxwell to close the two Associated Traders' accounts at the Bank and to find a "hidden" account in the Bank from which to conduct Associated Traders' business, so that the company's transactions could not be detected by bank or federal auditors. The Associated Traders' representative also stated specifically that he feared discovery of the company's Cayman Island money market accounts.

31. Mr. Maxwell told the Associated Traders' official that he would telephone him the following week with the information he had requested. The representative said that he did not want Mr. Maxwell to give him that

information over the telephone. The instructions of the Associated Traders' representative to conceal its account at the bank and to find a new bank in Panama to pass funds through to hide their origin, increased Mr. Maxwell's fears that he was being asked to process illegal transactions.

32. On February 25, 1985, Mr. Maxwell hand-delivered a second memorandum to Mr. Bond, in which Mr. Maxwell again requested written authorization for the transactions that he had processed for Associated Traders. Mr. Maxwell told Mr. Bond that his concerns and fears about possible illegalities were compounded by the comments made by the Associated Traders' representative to him on February 22. Mr. Maxwell also requested that his name be removed from the Associated Traders' corporate checking account and its Cayman Island Branch money market deposit accounts.

33. Later during the afternoon of February 25, 1985, Mr. Dael asked Mr. Maxwell what he meant by Associated Traders' "out of the ordinary" transactions. Mr. Dael also asked Mr. Maxwell if he had told anyone about his concerns. Mr. Maxwell responded by saying "a number of people". Although Mr. Dael pressed Mr. Maxwell to disclose the names, Mr. Maxwell refused to do so. Mr. Dael finally said that Mr. Bond would respond to Mr. Maxwell's memorandum by the end of the week.

34. On February 26, 1985, Mr. Bond called Mr. Maxwell into his office and asked if Mr. Maxwell had spoken to anyone in the Bank or news media about his concerns. Mr. Bond also questioned Mr. Maxwell on what he meant by "out of the ordinary". Mr. Maxwell told Mr. Bond that he could not speak to Mr. Dael about Associated Traders because he (Dael) had not been approved to work on the account, and that "the CIA was not above investigation". Mr. Maxwell repeated that his (Maxwell's) name was the only name on the account, and he wanted Mr. Bond's backing in writing for his work on the account. Mr. Bond

said that he wanted the matter to end "right here".

35. Shortly after the meeting with Mr. Bond, on February 26, 1985, Mr. Dael asked Mr. Maxwell what his feelings were about the meeting. Again Mr. Maxwell did not provide any information to Mr. Dael. Within 45 minutes of this conversation, Mr. Dael pulled Mr. Maxwell out of a meeting and demanded all the Associated Traders' files, which Mr. Maxwell gave him. Later that day, Mr. Dael called Mr. Maxwell from Mr. Bond's office to ask if there were any letters of credit for Associated Traders which were still open.

36. During the afternoon of February 26, 1985, Mr. Maxwell met with Mr. Bond, who told Mr. Maxwell that it was "courageous" of him to take the action he had taken, and he must be very "concerned." Mr. Bond told Mr. Maxwell to "stick it out with him" until he could satisfy Mr. Maxwell's needs. Mr. Maxwell repeated that all he wanted was written authorization from Mr. Bond. Mr. Bond told Mr. Maxwell that the Bank's attorney had stated that the movement of firearms by Associated Traders was "okay", and that Mr. Maxwell's name had been removed from the account.

37. On February 27, 1985, Mr. Dael again asked Mr. Maxwell about his meeting with Mr. Bond. Mr. Maxwell told Mr. Dael to discuss the meeting with Mr. Bond.

38. Mr. Maxwell had an excellent working relationship with Mr. Teather, Mr. Dael, and Mr. Bond prior to Mr. Maxwell's raising concerns about the legality and propriety of Associated Traders' transactions. After Mr. Maxwell raised his concerns, these working relationships deteriorated.

39. On March 1, 1985, Mr. Maxwell met with Mr. Bond who told him that he had met with his (Bond's) superiors at the Bank, and with the CIA's financial people. Unexpectedly Mr. Bond then said that Mr. Maxwell should

not fear that the CIA would be displeased with his actions. Mr. Bond also stated that Mr. Maxwell and his family were not in any "danger." Mr. Maxwell perceived Mr. Bond's statements to be veiled threats against him and his family. Mr. Bond later said that a lot of people Mr. Maxwell did not know could be hurt by his (Maxwell's) actions.

40. Mr. Bond also informed Mr. Maxwell that he could not give Mr. Maxwell the memorandum he had requested due to the CIA's direction not to do so. Mr. Bond's refusal led Mr. Maxwell to ask Mr. Bond whether Mr. Bond worked for the CIA or the Bank.

41. In this meeting, Mr. Bond also attempted to assure Mr. Maxwell that the CIA had stated that all the transactions were legal. Mr. Bond made a point of naming the CIA people he had met with, and referred to a January 10, 1985 meeting that Mr. Maxwell and he had attended with the CIA financial people.

42. Later during the afternoon on March 1, Mr. Maxwell received documentation for the Associated Traders' account that still had his name on it.

43. On March 7, 1985, Mr. Maxwell wrote a third memorandum to Mr. Bond, in which he stated that documentation from the Associated Traders' account still carried his name, and asked about the progress being made to remove his name from the account. On that same day, Mr. Maxwell rode in the elevator with two representatives from Associated Traders, who refused to talk to him. Mr. Dael stopped into Mr. Maxwell's office and said that it was his (Dael's) fault that Mr. Maxwell's name had not been removed from the account, and that it was now removed. Mr. Teather also stopped into Mr. Maxwell's office and asked about whether Mr. Maxwell had kept copies of documents relating to two transfers Mr. Maxwell had made to a Swiss bank for Associated Traders.

44. On March 11, 1985, Mr. Maxwell wrote Mr. Bond another memorandum requesting once again written

authorization for the work he had completed for Associated Traders. In that memorandum Mr. Maxwell explained his growing anxiety and fear about the legality of the transactions of Associated Traders, and about his personal well being and safety.

45. After receiving Mr. Maxwell's memorandum, and knowing of Mr. Maxwell's anxiety and fears, on March 14, 1985, Mr. Bond set up a meeting with Mr. Maxwell. In that meeting Mr. Bond asked Mr. Maxwell if he (Maxwell) wanted to meet with the CIA in Washington, or with Mr. Bond's "superiors". Mr. Maxwell asked who Mr. Bond's "superiors" were, but Mr. Bond refused to answer. Finally, Mr. Bond told Mr. Maxwell that he knew "what this is all about," and asked Mr. Maxwell what he was going to do. Mr. Maxwell did not answer the question, but again asked whether the Bank would provide written authorization. Mr. Bond replied that if he wanted he could terminate Mr. Maxwell's employment the next day.

46. During the early evening that same day, Mr. Bond called Mr. Maxwell at his home and asked Mr. Maxwell to meet with Fred Meier, Executive Vice President of the Bank, and Mr. Bond's superior. Mr. Maxwell agreed to meet with Mr. Meier on March 19, 1985.

47. On March 19, 1985, Mr. Maxwell met with Mr. Meier. From the statements Mr. Meier made in the meeting, it appeared that Mr. Meier had been fully informed of Mr. Maxwell's requests for authorization and the stress and pressure placed on Mr. Maxwell by the direction to work on the Associated Traders' account. Mr. Meier told Mr. Maxwell that he (Meier) understood that Mr. Maxwell was upset over the CIA. Mr. Maxwell corrected Mr. Meier and said that he was upset about Mr. Bond's refusal to provide him with written authorization for the transactions he had processed for Associated Traders.

48. Mr. Meier then insisted that Mr. Maxwell's requests had been reviewed by the Bank's in-house attorneys

and their outside counsel of Piper & Marbury, and that an attorney from Piper & Marbury was drawing up the written authorization that Mr. Maxwell had requested. Mr. Meier also stated that he and Charles Lyons, the Bank's Manager of International Operations, had brought the CIA business to the Bank over a decade ago, and that he was not concerned about what the CIA was doing. Mr. Maxwell replied that if what the CIA was doing were illegal, he (Maxwell) could be held accountable since his name was on the account. Mr. Meier confirmed that the Associated Traders' transactions were "out of the ordinary", but stated that Maxwell had no reason to ask for written authorization to do work for Associated Traders if none of the Bank's high level officers had ever needed it. Mr. Meier said that he would provide a written memorandum stating that "to the best of our knowledge" Mr. Maxwell's processing of Associated Traders' transactions was authorized. He said that after the Bank's attorney had drafted the authorization, the CIA would have to approve it before it was sent to Mr. Maxwell.

49. On March 22, 1985, Mr. Dael told Mr. Maxwell that he would probably receive the memorandum he had requested. About 20 minutes later, Mr. Meier asked Mr. Maxwell to meet with him in his office. During this meeting, on March 22, Mr. Meier said that Andre W. Brewster of Piper & Marbury had spent a whole day writing up the authorization. Mr. Meier then showed Mr. Maxwell a letter, and asked if he were satisfied with the letter. The letter stated only "[t]o the knowledge of the Bank, from the time of your employment to date, you have been conducting business in an authorized manner and in compliance with instructions." Mr. Maxwell said he was not satisfied with the letter because it did not contain a specific reference to Associated Traders. Mr. Meier said the Bank would not provide Mr. Maxwell with a specific reference to Associated Traders, and then attempted to intimidate Mr. Maxwell by accusing him of disloyalty to the Bank and to him (Meier). Mr. Meier also told Mr. Maxwell that 26 other banks were

handling the CIA's accounts.

50. On March 25, 1985, Mr. Meier delivered a memorandum to Mr. Maxwell, dated March 22, which contained the exact wording in the memorandum Mr. Meier had shown to Mr. Maxwell during their previous meeting on March 22.

51. On April 2, 1985, Mr. Maxwell received a less than average raise. In the Management Appraisal which Mr. Dael completed on Mr. Maxwell, he made unsubstantiated criticisms of Mr. Maxwell's communication skills, and lowered Mr. Maxwell's overall performance evaluation to only the satisfactory level.

52. On April 12, 1985, Mr. Dael called Mr. Maxwell into his office, and told him that he had exceeded his one hour lunch hour several times over the last two to three weeks. Mr. Dael's lowered evaluation and criticisms of Mr. Maxwell were in retaliation against him for Mr. Maxwell's raising concerns about the legality and propriety of the Associated Traders' transactions.

53. From April 19, 1985, through July, 1985, Mr. Teather frequently telephoned and visited Mr. Maxwell without any legitimate business reason to do so. He kept Mr. Maxwell informed about transactions being processed by the Bank for Associated Traders even though Mr. Maxwell's duties for the account had been removed. Mr. Teather's remarks and comments appeared to be for the purpose of harassing and attempting to intimidate plaintiff because he had raised concerns about the legality of the Associated Traders' transactions, and were intended to increase the job related stress on Mr. Maxwell to drive him from his employment.

54. From mid-March, 1985, until his constructive discharge from the Bank in August, 1985, Mr. Maxwell's superiors harassed him in his work, including undercutting his management of his department, and trying to construct a case that Mr. Maxwell could not get along with other bank

officers. Mr. Maxwell's superiors took these actions to retaliate against Mr. Maxwell for his raising concerns about the legality of Associated Traders' transactions.

55. On July 24, 1985, Mr. Maxwell wrote Mr. Meier a memorandum in which he requested that Mr. Meier incorporate in his written memorandum of March 22, a specific reference to Associated Traders.

56. On July 25, 1985, Mr. Dael called Mr. Maxwell into his office for a meeting with Mr. Bond. Mr. Bond questioned Mr. Maxwell on what he wanted from Mr. Meier. Mr. Bond asked Mr. Maxwell whether he would be satisfied if Mr. Meier acknowledged Mr. Maxwell's last memorandum, and attached Mr. Maxwell's memorandum to Mr. Meier's memorandum of March 25, 1985. Mr. Maxwell said that he would agree to Mr. Bond's proposal. Mr. Bond then stated that Mr. Meier would have to get back to Mr. Maxwell about an answer to Mr. Maxwell's memorandum of July 24, 1985, after Mr. Meier returned to the office the following week.

57. Mr. Meier never spoke to Mr. Maxwell about his memorandum, and never responded to Mr. Maxwell's memorandum, as Mr. Bond had promised.

58. Starting in February, 1985, Mr. Maxwell's working conditions grew increasingly intolerable so that a reasonable person in Mr. Maxwell's place would be compelled to resign. Mr. Maxwell's superiors increased their harassment of him in order to drive him from his job. Mr. Maxwell's fears and anxieties about the legality of the Associated Traders' transactions that he had carried out increased due to the Bank's refusal to back his work on the account in writing. Mr. Maxwell's fear for his safety and his family's safety also increased due to the comment made by Mr. Bond which Mr. Maxwell perceived as a threat, and the unwillingness of the Bank officials to put anything in writing about Mr. Maxwell's work on the Associated Traders' account. Due to this increasing stress on Mr.

Maxwell, on or about August 12, 1985, Mr. Maxwell was compelled to submit his resignation to the Bank. The Bank accepted Mr. Maxwell's resignation, effective immediately.

59. At the time of his constructive discharge from the Bank, Mr. Maxwell was offered a position at the Maryland National Bank. He accepted that position and went to work for the Maryland National Bank, located in Baltimore, on August 19, 1985.

60. Still fearful that the Associated Traders' transactions he had processed were illegal, and increasingly fearful that he could be held liable for these transactions, on or about September 5, 1985, Mr. Maxwell wrote a letter to Charles W. Cole, Jr., President and Chief Executive Officer of the defendant Bank. In this letter, Mr. Maxwell made yet another request that the Bank provide him written authorization for the work he had performed for Associated Traders. Mr. Maxwell informed the Bank that if it did not provide a satisfactory response to his letter, he would look to "alternative legal means" to protect himself.

61. On or about September 17, 1985, Mr. Dael called Mr. Maxwell and told him that Associated Traders and its "parent company", which Mr. Maxwell knew to be the CIA, wanted to meet with Mr. Maxwell. Mr. Maxwell told Mr. Dael that he did not want to meet with them, but that he did want written authorization from the Bank for his work on Associated Traders' account. Mr. Dael asked Mr. Maxwell whether a written response from Mr. Cole would satisfy him. Mr. Maxwell replied that it depended on what Mr. Cole stated in the response. Mr. Dael then attempted to pressure Mr. Maxwell to tell him what he would do if he were not satisfied by the response.

62. About two weeks later, Mr. Maxwell suffered a nervous breakdown as a result of the emotional stress placed on him by threats to his safety and to his family's safety; by the Bank's directions to him to conduct certain transactions which the Bank would not ratify and which Mr. Maxwell

believed to be illegal; by the uncertainty as to whether he could be held liable in the future for the Associated Traders' transactions; by the pressure placed on him to meet with the CIA after he left the Bank; and by his superiors' harassment of him after he raised concerns about the legality of Associated Traders' transactions.

63. As a result of his nervous breakdown, and the pressure put on Mr. Maxwell by the defendants, Mr. Maxwell was unable to continue work at the Maryland National Bank, and has been unable to work in the banking industry since that time.

64. On August 11, 1988, Mr. Maxwell filed the original complaint in this action.

65. In or around January, 1989, Joseph G. Finnerty, counsel for the defendant Bank, had a telephone conversation with Thomas J. Dolina, plaintiff's counsel, during which Mr. Finnerty, acting on behalf of the CIA, the FBI, and Department of Justice officials, or as part of a conspiracy with officials of the CIA, the FBI and the Department of Justice, transmitted threats to plaintiff's attorney with the express purpose of preventing Mr. Maxwell from pursuing his suit against the Bank.

66. Mr. Finnerty told Mr. Dolina "off the record" that he had spoken with two people from the CIA, one person from the FBI, and two people from the Department of Justice, who had told Mr. Finnerty to warn Mr. Dolina "to go easy" in the lawsuit. Mr. Finnerty said that if this advice were not followed, Mr. Dolina would be disbarred and Mr. Maxwell would be criminally prosecuted. Mr. Finnerty also stated that William Webster, at that time the Director of Central Intelligence, was monitoring the case.

67. Despite two subsequent requests from Mr. Maxwell's attorney, Mr. Finnerty refused to identify the five persons who had made this threat to Mr. Maxwell.

68. Defendant Bank placed plaintiff's name on the Associated Traders' account without plaintiff's consent, and

in order to promote the business interest of the Bank. Defendant Bank refused to remove plaintiff's name from the account until about a month after his initial request to have his name removed from the account. Defendant Bank's placement of Mr. Maxwell's name on the account was without Mr. Maxwell's permission and exposed him to potential criminal and civil liability.

COUNT ONE -- CONSPIRACY TO VIOLATE 42 U.S.C. 1985(2)

69. Plaintiff incorporates by reference the allegations in paragraphs 1 through 68 above, as through restated.

70. Defendants Associated Traders Corporation a/k/a CIA, John Does One through Ten, and Bank officials and attorneys conspired together to deprive Mr. Maxwell of the equal privileges and immunities of his United States citizenship, including his right to seek redress of grievances in the courts of the United States. In furtherance of this conspiracy, defendants made threats to Mr. Maxwell and his attorney in order to prevent Mr. Maxwell from filing this suit and from vigorously pursuing prosecution of this suit, including threats that Mr. Maxwell would be criminally prosecuted and that Mr. Maxwell's attorney would be disbarred, and a threat to Mr. Maxwell, transmitted through a Bank official, that Mr. Maxwell's safety and the safety of his family was in jeopardy.

71. As a result of the conspiracy described in paragraph 70 above, and the acts taken by defendants to further it, the defendants have deprived Mr. Maxwell of his right to give evidence, and to pursue redress of grievances in the courts of the United States, without fear of retaliation, in violation of 42 U.S.C. § 1985(2).

72. Defendants' conspiracy to interfere with Mr. Maxwell's exercise of his civil rights, described in paragraphs 70 to 71 above, violates clearly established statutory rights of plaintiff, of which the defendants are well aware, and of which a reasonable person would have known.

73. As a direct and proximate result of defendants' illegal conspiracy, and acts taken to further that conspiracy, Mr. Maxwell has suffered severe emotional pain and suffering, personal humiliation, permanent psychiatric injury, and has incurred significant expenses for medical treatment of these injuries. As a further direct and proximate result of defendants' illegal conspiracy, and acts taken to further that conspiracy, Mr. Maxwell has suffered serious and permanent damage to his professional reputation and his career.

COUNT TWO -- VIOLATION OF FIRST AMENDMENT AND FIFTH AMENDMENT RIGHTS

74. Plaintiff incorporates by reference the allegations in paragraphs 1 through 68 above, as though restated.

75. The threats of defendants Bank, Associated Traders Corporation a/k/a the Central Intelligence Agency, and John Does One through Ten violate Mr. Maxwell's First Amendment right to speak out on issues of significant public concern, including the Central Intelligence Agency's and Associated Traders Corporation's illegal banking transactions, involving the purchase and transfer of millions of dollars of arms and weapons. Defendants have made these threats against Mr. Maxwell and his attorney with the purpose of intimidating and silencing Mr. Maxwell from raising his concerns publicly.

76. The threats of the defendants Bank, Associated Traders Corporation a/k/a the Central Intelligence Agency, and John Does One through Ten, against Mr. Maxwell and his attorney, described in paragraphs 39, 65, and 66 above, violate Mr. Maxwell's Fifth Amendment right to seek redress of grievances in the courts of the United States.

77. Plaintiff has no other statutory or legal remedy for redress of his injuries caused by defendants' actions to silence and intimidate him, and to prevent him from seeking redress in the courts of the United States.

78. Defendants' violation of Mr. Maxwell's constitutional rights, described in paragraphs 75 and 76

above, violate clearly established constitutional rights of plaintiff, of which the defendants are well aware, and of which a reasonable person would have known.

79. As a direct and proximate result of defendants' actions described above, plaintiff has suffered severe emotional pain and suffering, personal humiliation, and permanent psychiatric injuries, and has incurred significant expense for medical treatment of these injuries. As a further direct and proximate result of defendants' actions described above, plaintiff has suffered permanent damage to his professional reputation and his career.

COUNT 3 - ABUSIVE DISCHARGE

80. Plaintiff hereby incorporates by reference the allegations in paragraphs 1 through 68 above, as though restated.

81. Defendant Bank directed plaintiff to carry out and process transactions for the Associated Traders Corporation, a proprietary company of the CIA, which plaintiff had a reasonable belief violated federal statutes regulating the purchase, transfer, import, and export of arms, weapons, and electronic equipment to be used in war.

82. Defendant Bank created intolerable working conditions for plaintiff after he raised his concerns that the transactions he had been directed to carry out were illegal, including by refusing to provide written authorization to Mr. Maxwell for his work for Associated Traders, transmitting threats to Mr. Maxwell which led him to believe that his safety and the safety of his family was jeopardized, and harassing Mr. Maxwell at work in retaliation for his requests for written authorization for his work for Associated Traders.

83. Defendant Bank's creation of intolerable working conditions for Maxwell compelled Mr. Maxwell to resign from the Bank on August 12, 1985.

84. Defendant Bank's constructive discharge of plaintiff by harassing him and forcing his resignation from the Bank violated clearly mandated public policies, including

the public policies of the Arms Export Control Act of 1968, 22 U.S.C. §§ 2751-2796, federal statutes 22 U.S.C. §§ 2311, 2312, and 50 U.S.C. § 413, and the customs and practices of the banking industry set out in the Uniform Customs and Practice for Documentary Credits, ICC Publication No. 400 (1983 rev.).

85. Defendant Bank's constructive discharge described above constituted an abusive discharge of plaintiff which directly and proximately caused plaintiff a loss of income and other financial benefits, loss of employment, mental anguish, pain and suffering, shame, personal humiliation, and permanent psychiatric injury.

COUNT FOUR - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

86. Plaintiff incorporates by reference the allegations stated in paragraphs 1 through 68 above, as though restated.

87. Defendant Bank, through its actions described above, intentionally, or with wanton and reckless disregard, caused plaintiff to suffer severe emotional distress, including but not limited to emotional trauma related to harassment of plaintiff at work, plaintiff's fear of bodily injury to himself and to his family, plaintiff's anxiety about the possibility of future criminal or civil liability for his work for Associated Traders, fear related to the Bank's refusal to provide him written notarization for the work he performed for Associated Traders, personal embarrassment and humiliation, and permanent psychiatric injury, including a nervous breakdown.

88. Defendant Bank's conduct described above was extreme and outrageous.

89. Defendant Bank's intentional infliction of emotional distress directly and proximately caused plaintiff loss of income and other economic benefits, permanently damaged his professional career, caused plaintiff emotional distress, personal embarrassment and humiliation, trauma, extreme anxiety, fear, and permanent psychiatric injury,

including a nervous breakdown, and caused plaintiff to incur significant medical expenses for treatment of these injuries.

COUNT FIVE -- MISAPPROPRIATION OF PLAINTIFF'S NAME.

90. Plaintiff incorporates each of the allegations in paragraphs 1 through 68 above, as though restated.

91. Defendant Bank, without plaintiff's consent and in violation of plaintiff's direct request to the contrary, placed plaintiff's name on the account of Associated Traders, in order to further the Bank's business and pecuniary interest in maintaining Associated Traders as a client of the Bank.

92. Defendant's action described in paragraph 91 above, directly and proximately caused plaintiff severe emotional distress, pain and suffering, trauma, fear of bodily injury to himself and to his family, embarrassment and personal humiliation, permanent psychiatric injury, and caused plaintiff to incur considerable expense for treatment of these injuries.

WHEREFORE, plaintiff respectfully prays that this Court:

1. Issue an order enjoining defendants, and all those in concert with them, from harassing, intimidating, or in any way interfering with plaintiff's exercise of his First Amendment right to speak out on issues of public importance involving Associated Traders' or the CIA's illegal banking transactions;

2. Issue an order enjoining defendants, and all those in concert with them, from harassing, intimidating, or in any way interfering with plaintiff's exercise of his Fifth Amendment right to pursue litigation of his claims in this action, or in any other court of the United States;

3. Issue an order awarding plaintiff compensatory damages from all defendants, jointly and severally, in the amount of $2.0 million;

4. Issue an order awarding plaintiff punitive damages, jointly and severally, in the amount of $2.0 million;

5. Award plaintiff his attorneys fees and costs incurred in bringing this action; and

6. Award such other relief as this court deems appropriate.

/s/

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DATED: March 19, 1990

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No. 93-577

In The

Supreme Court of the United States

October Term, 1993

ROBERT J. MAXWELL,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF MARYLAND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THE FIRST NATIONAL BANK OF MARYLAND AND ASSOCIATED TRADERS CORPORATION

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QUESTIONS PRESENTED

The United States intervened in this case and asserted the state secrets privilege to preclude the disclosure in the proceeding of any information that would tend either to confirm or to deny an alleged relationship between the Central Intelligence Agency ("CIA") and either respondent The First National Bank of Maryland or respondent Associated Traders Corporation. The question presented in the Petition is whether the United States' assertion of the privilege should not have been recognized because (a) the information protected was not covered by a secrecy agreement between the CIA and the petitioner and (b) the government has not acted to bar the petitioner from making extrajudicial statements about the alleged relationships. A subsidiary question apparently raised in the petitioner's argument in support of his Petition is whether this case could be tried without the presentation of evidence tending to confirm or deny the alleged connections between the CIA and the respondents.

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No. 93-577

In The

Supreme Court of the United States

October Term, 1993

ROBERT J. MAXWELL,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF MARYLAND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

This brief is filed on behalf of the respondents The First National Bank of Maryland ("FNB" or the "Bank")[1] and Associated Traders Corporation ("ATC"), as well as the former directors of ATC.

STATEMENT OF THE CASE

According to the Amended Complaint, petitioner Robert J. Maxwell was employed by the Bank to work in its International

1. FNB is a subsidiary of First Maryland Bancorp and Allied Irish Bank, P.L.C. FNB has no non-wholly-owned subsidiaries.

Division from October, 1983 to August, 1985. It is alleged that, during petitioner's first week on the job, his then supervisor, Ronald Teather, asked him to work on ATC's accounts, and that Mr. Teather informed petitioner that ATC was actually the Central Intelligence Agency ("CIA"). First Amended Complaint ¶ 11. The petitioner allegedly agreed to do the work and was given a form to complete for the purpose of obtaining "CIA approval to do work for the Associated Traders' account." *Id.*

The Amended Complaint describes three transactions involving transfers of funds from ATC accounts that the petitioner handled during his employment with FNB: one in December, 1983, a second in January, 1985, and a third in February, 1985. *Id.* ¶¶ 13, 20-21, 28. At about the time of the last transaction, petitioner allegedly became concerned about ATC's activities and demanded written assurance from his superiors at FNB regarding his authorization to carry out the ATC funds transfers; he also requested that his name be removed from the ATC account records with FNB. *Id.* ¶¶ 26-32. It is alleged that a number of conversations ensued, during one of which petitioner's superiors assured him that he "should not fear that the CIA would be displeased with his actions" and that he "and his family were not in any 'danger' "; petitioner allegedly perceived these statements to be "veiled threats". *Id.* ¶ 39. On March 25, 1985, petitioner was given a memorandum signed by an FNB Executive Vice President that stated "[t]o the knowledge of the Bank, from the time of your employment, to date, you have been conducting business in an authorized manner and in compliance with instructions"; this document failed to satisfy petitioner because it did not explicitly mention ATC. Ex. No. 3 to Complaint filed in Circuit Court for Baltimore City (Aug. 11, 1988); First Amended Complaint ¶ 49.

It is generally alleged that between February and August, 1985, petitioner was "harassed" by his superiors and his "working conditions grew increasingly intolerable", all because of the

concerns that he had raised regarding the legality of the ATC transactions. *Id.* ¶¶ 54-58. In April, 1985, petitioner "received a less than average raise" and a performance evaluation that was "only [at] the satisfactory level." *Id.* ¶ 51. As a result of his "increasing stress", petitioner felt "compelled" to resign from the Bank on August 12, 1985. *Id.* ¶ 58. Although he went to work for a rival bank in Baltimore a few days later, petitioner did not leave his worries about ATC behind him; in early September, 1985, he wrote to FNB's President, again demanding "written authorization" for his work on the ATC transactions. *Id.* ¶ 60. In mid-September, 1985, an FNB executive allegedly called petitioner and informed him that representatives of ATC and the CIA wished to meet with him, but he declined to do that. *Id.* ¶ 61. Finally, about two weeks later, petitioner allegedly suffered a "nervous breakdown"; he has allegedly not been able to work in banking since. *Id.* ¶¶ 62-63.

On August 11, 1988, petitioner filed a suit against the Bank in the Circuit Court for Baltimore City seeking compensatory and punitive damages for the use of his name without authorization, wrongful discharge, breach of employment contract, and both intentional and negligent infliction of emotional distress. On the petition of FNB, the case was removed to the United States District Court for the District of Maryland in September, 1988.

On June 11, 1990, petitioner was granted leave to file an Amended Complaint in which he brought in as additional defendants ATC (characterized as "a/k/a the Central Intelligence Agency"), the three former directors of ATC (which had been dissolved in 1988), and John Does One through Ten, described as "Unknown Officials" of the CIA, the Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ"). *Id.* ¶ 1. The First Amended Complaint dropped the claim based on negligent infliction of emotional distress, and added two new counts: a claim that the Bank had conspired with unknown officials of the CIA, the FBI and DOJ to interfere with petitioner's civil

rights, in violation of 42 U.S.C. § 1985(2), and a *Bivens* claim alleging violation of petitioner's "First Amendment right to speak out on issues of significant public concern . . ." *Id.* ¶¶ 69-79. The new claims were based principally upon a telephone conversation that occurred in January, 1989, in which counsel for FNB, purportedly acting "on behalf of" or "as part of a conspiracy with" the CIA, the FBI, and DOJ, allegedly informed petitioner's former lawyer, Thomas J. Dolina (who was replaced by petitioner in October, 1989) that he should "go easy" in the matter and "that if this advice were not followed, Mr. Dolina would be disbarred and Mr. Maxwell would be criminally prosecuted". *Id.* ¶¶ 65-66.

Acting on a Motion to Compel filed by petitioner, the district court on July 19, 1990, entered an order directing Mr. Teather to respond to "various questions regarding the status of the CIA as a bank customer and the nature of various shipments by ATC" and directing FNB to provide copies of "wire fund transfers, documents, or other memoranda which have some reference to Associated Traders Corporation". Memorandum accompanying Order granting Motion to Compel (July 19, 1990). In December, 1990, the United States filed a Suggestion of Interest and moved for a protective order "precluding all discovery or the disclosure of any information during any proceedings in this matter that would tend to either confirm or deny any alleged connection between the Central Intelligence Agency and either defendant First National Bank of Maryland or defendant Associated Traders Corp." Suggestion of Interest by the United States of America and Motion for a Protective Order (December 26, 1990). The motion was accompanied by a Declaration and Formal Claim of State Secrets Privilege executed by William H. Webster, who was then Director of Central Intelligence. Mr. Webster asserted the state secrets privilege in order to preserve the government's option of neither confirming nor denying any relationship with either ATC or the Bank. Mr. Webster averred that "a confirmation or denial of information concerning an alleged covert CIA contact or

relationship would damage the national security for several reasons", which he went on to describe in general terms. Declaration and Formal Claim of State Secrets Privilege by William H. Webster (December 21, 1990) ¶ 9. Mr. Webster also submitted an *ex parte, in camera* declaration explaining his reasons in greater detail.

On May 7, 1991, the court referred all discovery matters to Magistrate Judge Catherine C. Blake for resolution. On October 9, 1991, Magistrate Judge Blake issued a Report and Recommendation in which she found, based on the declarations that the government had submitted with its motion and additional material that had been provided *in camera* at her request, that "the United States has shown a reasonable danger that disclosure of information concerning the existence of a relationship between the CIA and ATC or FNB would harm national interests, including intelligence-gathering methods and capabilities, and relations with foreign governments", and accordingly recommended that the United States' Motion for a Protective Order be granted. (App. 32a).[2] After a *de novo* review of the entire matter, District Judge William M. Nickerson entered an Order affirming and adopting the Magistrate's Report and Recommendation on April 29, 1992. (App. 14a-15a).

Following the entry of the protective order, FNB and ATC filed motions for dismissal or, in the alternative, for summary judgment, on the ground that petitioner would be unable to prove any of his claims without violating the terms of the protective order. In a Memorandum filed on September 30, 1992, Judge Nickerson reviewed the petitioner's claims seriatim and determined that none of them could be proved without evidence

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2. Appendix citations are to the appendix to the Petition for a Writ of Certiorari.

made unavailable by the protective order. (App. 5a-12a). Accordingly, the motions for summary judgment were granted and judgment was entered in favor of the respondents. (App. 13a).

The petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's judgment in an unreported, *per curiam* opinion rendered on July 14, 1993. (App. 1a-4a).

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

The respondents oppose the grant of certiorari. The petitioner has not satisfied any of the certiorari considerations set forth in Rule 10. The Fourth Circuit's decision is not in conflict with the decision of any other federal court of appeals, nor has the Fourth Circuit decided an important question of constitutional law that has not been, but should be, addressed by this Court, or in any "way that conflicts with applicable decisions of this Court."

The petitioner incorrectly characterizes the district court's decision as an "unprecedented expansion of the state secrets privilege" (Petition at 12-13). On the contrary, as the United States demonstrates in its Brief, the rulings of the district court on the government's motion for protective order and the respondents' motions for summary judgment were based upon, and compelled by, well-established principles regarding the recognition and application of the privilege. The propriety of the district court's granting the protective order, and the scope of that order, are discussed in the government's Brief and need not be further addressed here.

The petitioner asserts that "as a matter of law, whether the CIA was, in fact, involved is irrelevant to Mr. Maxwell's claims and the possible defenses in this case" (Petition at 21), thus raising the question whether those claims could hav been tried without disclosing the information (and endangering the national interests) guarded by the protective order. Because the Court might find this question to be "fairly included" in the Question Presented in the Petition, this Memorandum briefly analyzes the claims set forth in the Amended Complaint to show that any trial of those claims would necessarily threaten the disclosure of information that would tend to establish the existence *vel non* of the alleged CIA-ATC-FNB connection.

II.

THE DISTRICT COURT PROPERLY FOUND THAT THIS CASE COULD NOT BE TRIED WITHOUT ENDANGERING PROTECTED STATE SECRETS.

Count 1. Petitioner must prove the existence of a conspiracy to interfere with his civil rights, in violation of 42 U.S.C. § 1985(2), to establish this claim. The claim is based upon a single alleged incident: a telephone call made to petitioner's former lawyer by a lawyer for FNB, who was allegedly "acting on behalf of the CIA, the FBI, and Department of Justice officials, or a part of a conspiracy with officials of the CIA, the FBI and the Department of Justice . . . ." First Amended Complaint ¶ 65. It would be impossible to try this count without presenting evidence that would tend to establish a relationship between the CIA, ATC, and FNB, in violation of the protective order.

Count 2. This count is a *Bivens* claim for violation of rights protected by the First Amendment based upon alleged "threats of defendants Bank, Associated Traders Corporation a/k/a the Central Intelligence Agency, and John Does One through Ten . . . ." First

Amended Complaint ¶ 75. A showing of state or federal governmental action is required to support this claim. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The district court properly found that evidence of the only "state action" alleged in support of this claim — the involvement of the CIA in a conspiracy with FNB and ATC — is barred by the terms of the protective order.

Count 3. In order to establish his claim for constructive abusive discharge, petitioner must show that the motivation for his alleged discharge "contravenes some clear mandate of public policy." *Adler v. American Standard Corporation*, 291 Md. 31, 47, 432 A.2d 464, 473 (1981). According to the First Amended Complaint (¶ 84), the public policies that the Bank violated are those expressed in the Arms Export Control Act, 22 U.S.C. §§ 2751-2796, the International Security and Development Cooperation Act of 1981, 22 U.S.C. §§ 2311-2312 (1990) and the Congressional Oversight Act, 50 U.S.C. § 413 (1991). Inquiry whether the ATC accounts were controlled by the CIA, as petitioner alleges, as well as inquiry regarding the purpose of the funds transfers that petitioner allegedly effected for ATC, would be necessary to reach a judgment regarding which, if any, of those laws were violated.

Count 4. In support of his claim for intentional infliction of emotional distress, petitioner relies upon allegations that he was asked to work on ATC accounts that were covert CIA accounts used to perform illegal activities, and that FNB officials made statements to the effect that the CIA was monitoring petitioner's attempts to air his concerns about the accounts and was both threatening him and requesting meetings with him. Clearly, evidence offered to support or refute those allegations would tend to confirm or deny the existence of a CIA-ATC-FNB relationship. Petitioner's allegations that he received "only" a satisfactory performance rating and a "less than average pay raise", while perhaps not requiring proof of CIA involvement, are scarcely

sufficient in themselves to establish a claim for intentional infliction of emotional distress under Maryland law. *See, e.g., Beye v. Bureau of National Affairs,* 59 Md. App. 642, 477 A.2d 1197, *cert. denied,* 301 Md. 639, 484 A.2d 274 (1984).

Count 5. Petitioner's claim for misappropriation of name is based on his allegation that FNB officials placed his name on ATC account records without his consent. According to the First Amended Complaint (¶ 92), this "caused plaintiff severe emotional distress, pain and suffering, trauma, fear of bodily injury to himself and to his family, embarrassment and personal humiliation, [and] permanent psychiatric injury . . . ." This litany of injuries makes no sense if it is merely established that the Bank put petitioner's name on an account of a customer without his consent; an assessment of petitioner's claim under Count 5 would necessarily entail inquiry into petitioner's allegations regarding CIA control of the ATC account and the nature and legality of the funds transfers effected through that account.

In sum, the alleged relationship among the CIA, ATC and FNB lies at the center of each of the petitioner's claims. Thus, virtually all of the evidence that would be presented by the petitioner in attempting to establish his claims, and by the respondents in refuting those claims, would necessarily tend in one way or another to confirm or deny the existence of that relationship. In order to give effect to the order protecting state secrets, the district court had no option but to grant the respondents' motions for summary judgment.

CONCLUSION

For these reasons, and for the reasons put forth by the United States, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 6 1994
OFFICE OF THE CLERK

No. 93-577

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT J. MAXWELL, PETITIONER

v.

FIRST NATIONAL BANK OF MARYLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, following the government's assertion of the state secrets privilege, the district court properly barred petitioner from offering at trial any evidence that would tend to confirm or deny any connection between respondents and the Central Intelligence Agency.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the decision is noted at 998 F.2d 1009 (Table). The opinion of the district court (Pet. App. 5a-15a) is unreported, but the district court's order adopting the Magistrate Judge's Report and Recommendation is reported at 143 F.R.D. 590. The Report and Recommendation of the Magistrate Judge (Pet. App. 16a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1993. The petition for a writ of certiorari was filed on October 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Robert J. Maxwell worked for respondent First National Bank (Bank or FNB) as an executive in its International Division from October, 1983, to August, 1985, when he left that position to accept a job at another bank (Pet. App. 36a, 47a-48a; First Amended Complaint, ¶¶ 9, 58-59). Petitioner maintains that, while he was employed at FNB, he worked on an account for respondent Associated Traders Corporation (ATC), a business entity that he alleges was affiliated with the Central Intelligence Agency (CIA) (Pet. App. 37a, ¶ 11). He further alleges that it was his belief that some of ATC's transactions were illegal (Pet. App. 39a, ¶ 23) and that he sought written authorization from his superiors to conduct certain transactions on behalf of ATC in a manner that he thought was "out of the ordinary" (Pet. App. 40a-42a, ¶¶ 27-36). Petitioner also claims that he requested that his name be removed from the ATC account (Pet. App. 41a, ¶32; Pet. App. 43a, ¶ 43).

Although that request was ultimately honored (Pet. App. 46a, ¶ 53), and despite repeated reassurances from FNB officials that petitioner's work was not illegal (*e.g.*, Pet. App. 44a-45a, ¶¶ 48-49), petitioner alleges that he was concerned that he would be held criminally liable for his work on the ATC account, thus causing him to suffer anxiety and fear (Pet. App. 43a-44a, ¶ 44). More than a month after leaving FNB, petitioner suffered a nervous breakdown, which he alleges resulted from stress induced by working on the ATC account (Pet. App. 48a-49a, ¶ 62).

2. a. On August 11, 1988, almost three years after leaving his position with FNB, petitioner filed suit

against the Bank, alleging misappropriation of name, constructive discharge, and intentional and negligent infliction of emotional distress.[1] In June, 1990, he was granted leave to file an amended complaint, in which he named ATC as an additional defendant and alleged that ATC was a "proprietary company of the U.S. Central Intelligence Agency" (Pet. App. 36a, ¶ 6). Because ATC was dissolved on August 10, 1988, petitioner also named as defendants ATC's Directors, Thomas G. Hardie, John Keating, and Jeremy Tyrone, who became Trustees of ATC assets after dissolution (Pet. App. 36a, ¶ 7).[2] Finally, petitioner named as defendants "John Does One through Ten," whom he alleged were officials of the CIA, the FBI, and the Department of Justice (Pet. App. 36a, ¶ 8).

The Amended Complaint contained five counts. Count 1 alleged a conspiracy to violate 42 U.S.C. 1985(2), based on petitioner's assertions that he "perceived" statements by an FNB official to him in March, 1985, as "veiled threats" against him and his family (Pet. App. 42a-43a, ¶ 39), and that in January, 1989, after petitioner filed suit, FNB's counsel relayed a threat from employees of the CIA, the FBI and the Department of Justice, urging petitioner "to go easy" on the case (Pet. App. 50a-51a, ¶¶ 69-73). Count 2 alleged that these purported threats violated petitioner's First and Fifth Amendment rights (Pet. App. 51a-52a, ¶¶ 74-79). Count 3 alleged that FNB abusively discharged petitioner by creating intolera-

[1] Petitioner originally filed suit in state court. The action was removed to federal court in September, 1988.

[2] The use of "ATC" in this brief refers to ATC and its individual Directors and Trustees, collectively.

ble working conditions for him after he voiced concerns about transactions he allegedly carried out for the ATC account (Pet. App. 52a-53a, ¶¶ 80-85). Count 4 alleged that petitioner suffered intentional infliction of emotional distress because FNB threatened and intimidated him in connection with the ATC account (Pet. App. 53a-54a, ¶¶ 86-89). Finally, petitioner alleged in Count 5 that FNB misappropriated his name by retaining it on the ATC account after his request that it be removed (Pet. App. 54a, ¶¶ 90-92).

During discovery, petitioner sought to compel responses to questions posed at a deposition of one of his supervisors at FNB concerning the CIA's connection with FNB and the nature of various transactions by ATC. Petitioner also sought production of wire fund transfers and other documents concerning ATC (C.A. App. 114, 289). The district court initially granted the motion to compel in part (C.A. App. 114-115), finding that the privilege asserted by the Bank "does not apply because only the government can assert it" (C.A. App. 114).

b. The United States then filed a Suggestion of Interest pursuant to 28 U.S.C. 517, and moved for a protective order precluding all discovery or use at trial of information "that would tend either to confirm or deny any alleged connection between the Central Intelligence Agency and either defendant First National Bank of Maryland or defendant Associated Traders Corp[oration]" (C.A. App. 129). The basis for the protective order motion was the formal assertion of the state secrets privilege by then-Director of Central Intelligence, William Webster, in a public declaration (C.A. App. 133-138), supported by a classi-

fied *in camera, ex parte* declaration further explaining the reasons for the privilege.[3]

Director Webster's declaration acknowledged that, among the intelligence sources and methods the CIA uses are proprietaries, which are "business entities, wholly owned by the U.S. Government, which either actually conduct or appear to conduct business as private commercial companies" (C.A. App. 135, ¶ 7). He further explained that the CIA is repeatedly asked, through discovery and FOIA requests, to respond to inquiries concerning its covert contacts with individuals and various entities, including proprietaries.

Despite the general acknowledgment that the CIA uses proprietaries as intelligence methods, Director Webster stated that it was "absolutely essential" to his responsibilities as Director of Central Intelligence to preserve his ability to decline to discuss allegations regarding specific covert relationships, whether true or not (C.A. App. 136, ¶ 8). Because petitioner sought such information concerning ATC, Director Webster determined that the assertion of the state secrets privilege was necessary and appropriate to protect the national security (C.A. App. 135-137, ¶¶ 6, 9).

Director Webster stated that, if the allegations concerning FNB or ATC were true, discovery and further litigation of petitioner's allegations concerning the CIA would inevitably lead to disclosure of matters that would jeopardize intelligence sources

[3] This classified declaration will be produced under appropriate security procedures for the Court's review upon its request.

and methods, result in a loss of valuable intelligence, provide foreign intelligence entities with valuable information, allowing them to take measures to counter CIA efforts, and have a chilling effect on the CIA's ability to recruit and use intelligence methods. On the other hand, Director Webster stated that, if petitioner's allegations were untrue and were confirmed as such, harm to the national security would result because foreign intelligence entities would be able to concentrate their activities elsewhere. Such a confirmation would, moreover, erode the ability of the Director of Central Intelligence to refuse to confirm or deny other similar allegations in the future (C.A. App. 136-137, ¶ 9).

c. The district court referred the United States' motion for protective order and plaintiff's motion to compel discovery to a Magistrate Judge for disposition (C.A. App. 283, 285). On October 9, 1991, the Magistrate Judge recommended that the United States' motion for protective order be granted (Pet. App. 16a-33a).

The Magistrate Judge first held that the government had satisfied the requirements for assertion of the privilege articulated in *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953) (Pet. App. 19a). She then rejected the argument that the government could not assert the state secrets privilege in a lawsuit between private parties who have no relationship with the government (Pet. App. 22a-23a). The Magistrate Judge further held that neither speculation and published accounts about ATC's relationship to the CIA (primarily the result of petitioner's disclosures to the press) nor accidental disclosure could waive the government's privilege (Pet. App. 24a). Finally, the

Magistrate Judge noted that any attempts by the Bank or ATC to respond to plaintiff's assertions "would go to the heart of the state secrets that must be protected" (Pet. App. 30a-31a).

d. The district court adopted the Magistrate Judge's Report and Recommendation and granted the United States' motion for a protective order. This order provided (1) that "[petitioner] is precluded from seeking or obtaining any discovery that relates to his allegations of covert relationships between the CIA and either defendant [FNB] or defendant [ATC]," and (2) that "[petitioner] is precluded from offering in support of the amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA and defendants FNB and ATC" (Pet. App. 14a-15a).

e. The district court subsequently granted summary judgment to FNB and ATC (Pet. App. 13a). The court held that petitioner could not prove a violation of 42 U.S.C. 1985(2) because, in order to prove that the CIA acted in concert with FBI agents as well as respondent FNB, he would risk violation of the protective order by exposing evidence at trial that would tend to confirm or deny the existence of the CIA's role in the alleged relationship (Pet. App. 9a). Similarly, because petitioner's constitutional claims would depend upon showing that FNB acted as an agent of the government (a showing that would risk exposure of the privileged information in violation of the protective order), the court dismissed these claims as well (Pet. App. 10a). The court held that the state law claims of wrongful discharge and intentional infliction of emotional distress also must be dismissed, because petitioner would be unable to

prove that he was required to carry out illegal transactions without violating the protective order (Pet. App. 10a-11a). Finally, the court dismissed petitioner's claim that his name was misappropriated for commercial purposes since proof of any reason why his name was used in connection with the ATC account would also violate the protective order (Pet. App. 12a).

3. The court of appeals reviewed the *in camera* submissions, and, in an unpublished per curiam opinion, affirmed "for reasons adequately stated in the magistrate's report and in the opinion of the district court" (Pet. App. 4a).

ARGUMENT

1. The doctrine of state secrets, which has roots in both the common law and the Constitution, bars litigants from discovering or utilizing at trial information the disclosure of which would be contrary to national security. See, *e.g.*, *Totten* v. *United States*, 92 U.S. 105 (1875); *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). The state secrets privilege recognizes the fact that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). The privilege may be invoked by the head of a governmental department with responsibility over the matter in question, and the department head must have personally considered the matter. See *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953).

Petitioner does not dispute the fact that the government has satisfied these formal requisites for the assertion of the state secrets privilege. Nor does he challenge that portion of the district court's protective order that barred him from "seeking or obtaining any discovery that relates to his allegations of covert relationships between the CIA and either defendant [FNB] or defendant [ATC]." Pet. App. 14a; see Pet. 12. Petitioner's sole objection before this Court is to that portion of the protective order barring him "from offering in support of the amended complaint in this case, any evidence that would tend to confirm or deny the alleged connection between the CIA and defendants FNB and ATC." Pet. App. 14a-15a; see Pet. 13. Petitioner bases this objection upon the theory that the state secrets privilege cannot be used to "bar a private litigant from using information that he obtained outside the discovery process and without a consensual secrecy agreement with the government." Pet. 14.

2. It is true that in both the *Snepp* and *Totten* cases the state secrets privilege was applied when former (or alleged former) government agents sought to reveal information that they had pledged (expressly in *Snepp* and implicitly in *Totten*) to keep confidential. It does not follow, however, that the privilege may be applied only in such cases. Indeed, the facts of this case demonstrate the limited ability of security clearances and nondisclosure agreements to protect sensitive information. As Director Webster acknowledged, the CIA utilizes proprietary businesses which either appear to conduct or actually do conduct business as private commercial enterprises (C.A. App. 135-136, ¶¶ 7-8). Such a proprietary entity cannot

reveal its CIA connection by requiring secrecy agreements from all private sector individuals with whom it conducts business. Nor can the proprietary subject every private individual with whom it must share information to a full background investigation and security clearance.

3. There is no merit to petitioner's contention that his First Amendment rights have been violated (Pet. 17-22). The government has never sought to prevent petitioner from speaking to the media or otherwise publicizing his speculations. In fact, he has done so.[4] Petitioner has been barred only from testifying in court about those speculations or producing evidence in support of them.

The First Amendment cases upon which petitioner relies are inapposite. In *Butterworth* v. *Smith*, 494 U.S. 624 (1990), the Court considered a Florida statute prohibiting grand jury witnesses from disclosing their testimony and held that the statute violated the First Amendment as applied to a reporter who wanted to publish a story about the subject matter of his testimony. Unlike the reporter in *Butterworth*, however, petitioner has not been barred from speaking about or publicizing his allegations. In

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[4] Petitioner argues that, in the case of privileges such as that between attorney and client, the disclosure of privileged information to third parties who are under no obligation to maintain the confidentiality of that information waives the privilege (Pet. 17). Whether or not that is true about other privileges, it is clear that the state secrets privilege is not "waived" when someone like petitioner makes public unsubstantiated allegations about the CIA. Cf. *Guong* v. *United States*, 860 F.2d 1063, 1065-1066 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989).

addition, the government interest at stake here is national security, not grand jury secrecy.[5]

4. It was proper for the district court, once it had concluded that the state secrets privilege was applicable in this case, not only to prohibit discovery, but also to prohibit petitioner from introducing at trial any evidence tending to confirm or deny a relationship between respondents and the CIA. "Once properly invoked, the effect of the privilege is to exclude the evidence from the case." *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). Accord *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992), cert. denied, 113 S. Ct. 1843 (1993); *Ellsberg* v. *Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984).

Indeed, it is settled that the outright dismissal of a case may at times be appropriate if the plaintiff cannot prevail without disclosing privileged information. As this Court held in *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 146-147 (1981) (quoting *Totten*, 92 U.S. at 107) (emphasis added):

> [W]e have held that "public policy forbids the *maintenance* of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as

[5] Petitioner also relies upon *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), in which this Court held that a trial court's issuance of a protective order barring a newspaper from publishing information which the newspaper had obtained through discovery did not violate the First Amendment. This decision reflects the principle that a party's right to publish information acquired through discovery is not unlimited; it cannot be read to mean that there is an unlimited right to use at trial information acquired outside of discovery.

> confidential, and respecting which it will not allow the confidence to be violated."

As the Magistrate Judge recognized, the Fourth Circuit's precedents "support the issuance of a protective order such as that proposed by the government, in that those opinions authorize the even more drastic result of dismissing the plaintiff's case" (Pet. App. 28a) (citing *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc)).

Petitioner argues that he can prevail on his claims "based solely on his own recollection of the threats that were made against him, and of documents shown to him that explain the motivation for these threats." Pet. 3. To allow petitioner to make these allegations at trial, however, would run the risk that state secrets would be disclosed. As the Magistrate Judge noted, "once plaintiff alleges that FNB officials told him that the CIA was involved in ATC, the bank officials and ATC would have to respond in order to defend themselves. Their response would go to the heart of the state secrets that must be protected." Pet. App. 30a-31a. Since it would be unfair to allow petitioner to offer his own speculations at trial, while forbidding counsel for the Bank and ATC to cross-examine him or present rebuttal evidence on these issues, extension of the protective order to petitioner's evidence at trial was an appropriate exercise of discretion by the district court in the circumstances of this case.[6] Cf. *Zuckerbraun*, 935 F.2d at

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[6] The courts below carefully reviewed the classified explanation for the assertion of the privilege. The Magistrate Judge

547 (dismissal is proper where "the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion"); accord *Bareford*, 973 F.2d at 1141; *Molerio* v. *FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984).

The application by the district court of the state secrets privilege to preclude petitioner from presenting evidence at trial that would connect the CIA with the defendants was thus reasonable in light of the specific facts before the court.[7] The affirmance of this protective order by the court of appeals does not conflict with any decision of this Court or any other court.[8] Further review of this issue is therefore not warranted in this case.

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conducted "an extensive investigation into the United States' assertion of the state secrets privilege" (Pet. App. 21a n.4) and even requested that the government file supplemental *in camera* responses addressing additional issues (Pet. App. 21a, 31a). The district court reviewed the Magistrate Judge's recommendation *de novo* (Pet. App. 14a). Finally, the court of appeals reviewed the *in camera* submissions in affirming the district court's ruling (Pet. App. 3a-4a).

[7] Petitioner suggests in his petition and argued in the courts below that the privilege was asserted in this case to cover up illegal activities (*e.g.*, Pet. 17, 21-22). The Magistrate Judge, however, concluded that "Mr. Maxwell's suggestion that the information involves illegal activities is speculation" (Pet. App. 26a-27a), noting that the government's classified submissions provided no support for such allegations (Pet. App. 27a n.9).

[8] Contrary to petitioner's assertion (Pet. 14-15), there is no conflict between this case and *Halpern* v. *United States*, 258 F.2d 36 (2d Cir. 1958). That case bears no factual resemblance to this one. Indeed, it did not even involve a protective order such as that issued by the district court. Halpern was an inventor who filed suit for compensation under the Invention Secrecy Act when the Patent Office entered a secrecy order

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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barring the issuance of a patent for his invention. The Second Circuit rejected the argument that the state secrets privilege barred litigation of Halpern's claim, reasoning that the Act must be viewed as waiving the privilege. See *id.* at 43. The court went on to say, however, that "any such waiver is dependent upon the availability and adequacy of other methods of protecting the overriding interest of national security during the course of a trial." *Ibid.* In this case, of course, petitioner does not contend—nor could he—that a federal statute has waived the privilege.

No. 93-577

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

ROBERT J. MAXWELL,

Petitioner,

v.

THE FIRST NATIONAL BANK OF MARYLAND, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Neither opposition to this petition disputes that the protective order issued below is based on an unprecedented extension of the state secrets privilege in that it bars the testimony of a private individual concerning information freely disclosed to him outside any confidential relationship with the federal government and outside the discovery process. Nor do the oppositions offer any precedent of this Court or of any lower court supporting this extension or justifying it on First Amendment grounds.

1. The government relies entirely on state secrets cases that prevented disclosure of information that had never previously been revealed outside secured channels. Opp. at 9, 11-12; *see, e.g.*, Opp. at 9 (In *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (*per curiam*), and *Totten v. United States*, 92 U.S. 105 (1875), government agents

"sought to *reveal* information that they had pledged (expressly in *Snepp* and implicitly in *Totten*) to keep confidential") (emphasis added).

The harm that these cases sought to prevent was the *disclosure* of secret information. Thus, as the government stresses, the privilege "bars litigants from discovering or utilizing at trial information *the disclosure of which* would be contrary to national security," Opp. at 8 (emphasis added), and the government's interest is in "protecting [] the *secrecy* of information important to our national security," *id.* (*quoting Snepp*, 444 U.S. at 509 n.3) (emphasis added).

Here, petitioner is not seeking to discover or reveal undisclosed state secrets. Everything that he seeks to offer as evidence has already been disclosed to him with no strings attached by employees or agents of his former employer, respondent First National Bank of Maryland ("FNB"). He has further disclosed what he was told during his bank employment to the press, and he has even recited it in court pleadings, which respondents have never sought to have sealed. The protective order entered below can do nothing to avoid the harm that the state secrets privilege guards against -- disclosure -- because the disclosure occurred long ago. Accordingly, there is no relation whatever between the state secrets privilege on which respondents rely and the protective order preventing petitioner from offering at trial what was disclosed to him during his private bank employment.

Neither the government nor FNB has cited any cases that extend the state secrets privilege to bar the use at trial of information that has been freely disclosed to a private individual who had no consensual secrecy relationship with the federal government. The government even concedes that no past state secrets case involved a situation analogous to this one.

In contrast, petitioner has cited two decisions of this Court that support the proposition that the First Amendment

forbids judicial restrictions, such as the protective order issued below, on the dissemination of information lawfully obtained by individuals outside the courts' process. *Butterworth v. Smith*, 494 U.S. 624 (1990); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The government seeks to distinguish *Butterworth* because it involved public dissemination of such information, rather than its use in court. However, there is not the slightest hint in *Butterworth* that the result would have been any different had the reporter sought to testify in court about the subject matter of his grand jury testimony, rather than write about it in a newspaper.

Moreover, contrary to the government's protestations, Opp. at 11 n.5, *Seattle Times* "*can*" be read to mean that the First Amendment precludes the use of protective orders to prohibit trial use of information obtained outside the discovery process. After all, in upholding the protective order regarding the use of discovery materials, this Court took care to make clear that litigants "may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes." 467 U.S. at 33-34.

For these reasons, the protective order barring petitioner from offering his own testimony as to what he was told and what he did during his private bank employment not only is unprecedented, but it raises serious constitutional issues warranting this Court's review.

2. Respondents assert that petitioner's claims cannot be tried because of the state secrets privilege and that it would be unfair to let them go forward. That assertion is not presented in this petition and is, moreover, wrong.

First, the district court decided only that petitioner could not prove his claims under this protective order, which prevented petitioner from offering his own testimony concerning what he was told about Associated Traders Corporation ("ATC") and the CIA. It did not decide the

viability of petitioner's claims under a properly drawn protective order that would permit the introduction of evidence already in petitioner's possession. Accordingly, the entire discussion in the joint opposition filed by FNB and ATC is wide of the mark, particularly since the district court had previously held that petitioner's amended complaint, which was based on that evidence, stated valid claims. District Court Memorandum and Order (June 11, 1990); District Court Memorandum and Order (Oct. 22, 1990).

Second, FNB neither asserted any defenses that hinge on *new* disclosures of state secrets, nor explained how it would need to make such disclosures in cross-examining petitioner or rebutting his evidence. Nor are such disclosures inevitable, since most of petitioner's claims depend not on the truthfulness of what was conveyed to him, but rather on how a reasonable person would react to it. In any event, although the district court is fully equipped to impose any appropriate limitations on any trial proceedings, neither it nor the court of appeals has yet considered the issue in the context of a properly limited protective order. Thus, the question whether a trial could go forward under a narrowly drawn protection order is not before the Court.

Third, the government contends that "it would be unfair to allow petitioner to offer his own speculations at trial, while forbidding counsel for the Bank and ATC to cross-examine him or present rebuttal evidence on these issues." Opp. at 12. In support of this assertion, the government argues that barring petitioner's testimony "was an appropriate exercise of discretion by the district court in the circumstances of this case." Opp. at 12 (footnote omitted).

Neither of these assertions is remotely based on the decisions below. The court of appeals, the district court, and the Magistrate Judge never addressed the fairness of precluding petitioner's testimony. Nor did they exercise any discretion, as the government erroneously suggests. Instead, they decided that the state secrets privilege had been properly

invoked to cover even petitioner's own testimony. They never asked whether a narrower protective order would be unfair to FNB, let alone whether it would be more or less unfair to deny petitioner his day in court.

Indeed, the fairness balance decidedly favors permitting petitioner to offer his evidence and seek redress. With respect to petitioner's employment claims, FNB obtained significant financial benefits from the ATC account, which may have been enhanced by its secretive nature. In contrast, petitioner endured significant emotional and financial harm as a result of the disclosures made to him. Even if the ATC account had a CIA connection, that fact does not excuse the tortious conduct of the bank. Petitioner should be able to present his evidence, and FNB should bear the costs of any obstacles that it might encounter in presenting its own case, especially since those obstacles may be based on consensual contractual arrangements, and since there is no evidence that it has no remedies to pursue against other involved parties.

Regardless of how the fairness issues may be resolved with respect to the discharge claims, it could not possibly be unfair to respondents to try petitioner's claim under 42 U.S.C. § 1985 based on respondents' vigilante-like threats to deter petitioner from pursuing this litigation. The state secrets privilege was designed as a legal means of suppressing sensitive information precisely so that government officials do not need to act as vigilantes outside the law. It would turn the state secrets privilege on its head and be grossly unfair to petitioner to use the privilege to preclude petitioner from seeking redress for the misconduct alleged in the amended complaint.

Although petitioner believes that these fairness issues would be resolved in his favor, they have not yet been decided by the courts below. Thus, the only issue raised in this petition is whether petitioner may be barred from testifying about what happened to him in his bank employment and about threats made to him after that

employment ended. Only when that issue has been correctly resolved in petitioner's favor will it be appropriate for the lower courts to decide any fairness issues based on a fully developed record.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

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